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Supreme Court of the United States

OCTOBER TERM, 1934.

No. 234.

THE UNITED STATES OF AMERICA EX REL. CHICAGO GREAT WESTERN RAILROAD COMPANY AND THE KANSAS CITY SOUTHERN RAILWAY COMPANY, PETITIONERS,

VS.

INTERSTATE COMMERCE COMMISSION ET AL., RESPONDENTS.

BRIEF FOR RESPONDENT, KANSAS CITY TERMINAL RAILWAY COMPANY.

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BRIEF FOR RESPONDENT, KANSAS CITY TERMINAL RAILWAY COMPANY.

THE OPINION BELOW.

No written opinion was rendered by the Supreme Court of the District of Columbia. The opinion of the Court of Appeals is now reported as *United States ex rel. Chicago Great Western Railroad Company* v. *Interstate Commerce Commission*, 71 F. (2d) 336, and is set forth in the record in full at page 199.

STATEMENT OF THE CASE.

This case comes to this Court on writ of certiorari to the Court of Appeals of the District of Columbia, which affirmed a judgment of the Supreme Court of the District of Columbia, denying the petitioners a writ of mandamus to require the Interstate Commerce Commission to vacate its order of dismissal and to take jurisdiction of and decide upon the merits the issues claimed to be raised by certain intervening petitions filed by the petitioners in a proceeding before the Interstate Commerce Commission instituted by Missouri-Kansas-Texas Railroad company (hereinafter called "M-K-T") against Kansas City Terminal Railway Company (hereinafter called "Terminal Company").

The Proceeding Before the Commission.

The M-K-T, a new company, which had purchased the railroad of the old Missouri, Kansas and Texas Railway Company at foreclosure sale and had disaffirmed the contract (called the "Operating Agreement") (R. 71), by which the old company had the right to use the Terminal Company's facilities (R. 14), sought by its complaint an order of the Commission requiring the Terminal Company to permit the M-K-T to use certain parts of the Terminal Company's facilities and to fix the compensation to be paid for such use under Paragraph (4) of Section 3 of the Interstate Commerce Act as amended by the Transportation Act of 1920. (R. 71.) It is unnecessary to quote Paragraph (4) in full at this point. It is enough that it authorizes the Commission

to require the use of facilities of one carrier by another under certain circumstances, and authorizes the Commission, in the event of a failure of the carriers to agree, to fix the compensation to be paid "on the principle controlling compensation in condemnation proceedings." (U. S. Code, Title 49, Sec. 3 (4).)

In the proceeding filed by the M-K-T (which, by virtue of its disaffirmance of the Operating Agreement, was not a party to the Operating Agreement) all of the parties to the Operating Agreement, including the petitioners, filed intervening petitions. Some supported the Terminal Company and the Operating Agreement. Others were similar to the Kansas City Southern and Chicago Great Western's petitions. Still others were somewhat indecisive. (R. 74, 75.) The intervening petitions of the petitioners will be found at pages 61 to 69 of the record. They are not identical, either in allegations or prayer. The Kansas City Southern's intervention, which is the more elaborate of the two, alleges that the Operating Agreement, under which the railroads entering Kansas City use and control the facilities of the Terminal Company, is unjust and inequitable through an unfair distribution of interest and taxes, that discrimination against it and other small users of the facilities results, and that, if the M-K-T is permitted to use the facilities for compensation less than that paid by the proprietary companies, the alleged discrimination will be accentuated, and prays "and if the Commission resolves the issue of jurisdiction prayed by the application of petitioner and the answer of the Terminal Company in favor of such jurisdiction and assumes jurisdiction in the premises, that

the Commission enter upon an investigation of the entire situation and enter such an order herein as will fairly, reasonably and without discrimination place the use and the terms thereof of the terminal facilities of the Terminal Company by the various parties enjoying such use on a fair, just and equitable basis among such parties, in accordance with and in proportion to the use thereof made by the various parties." (R. 69.) The Chicago Great Western's intervening petition alleges discrimination if "this Commission does take jurisdiction of the controversy [the M-K-T's] and does grant to complainant [M-K-T] the right to use the facilities of defendant upon the payment of any sum or sums less than those which it would be required to pay under the terms of said operating agreements." Its prayer is—"your petitioner further says, that if complainant is granted the right to use the facilities of defendant, the compensation therefor to be fixed by this Commission in any amount less than the amounts which complainant would be required to pay under said operating agreements, then that your petitioner is entitled to the same right and that any order entered herein granting said right to complainant should also grant similar relief to your petitioner." (R. 62.)

Though couched in general language, the substance of the Kansas City Southern's prayer was that if the Commission took jurisdiction of the M-K-T controversy, the terms of the Operating Agreement be entirely made over by the Commission. The Chicago Great Western on the other hand asked for relief from the full payments

prescribed in the Operating Agreement, only in the event the M-K-T obtained the right to use the facilities for compensation less than the amounts required to be paid by the Operating Agreement.

In this Court both petitioners appear to claim that they do not ask to have the contract rewritten, but that they want the Commission to exercise the police power upon only one of the terms of the contract—leaving the contract otherwise undisturbed. (Petitioners' Brief 43, 51, 52.)

The Commission, after having heard extensive testimony offered by the petitioners, along with the testimony offered by the M-K-T and other interveners, dismissed these intervening petitions, as well as the intervening petitions of several other intervening railroad companies. (R. 119.) The order of dismissal does not state the reason for the dismissal, but the report of the Commission (which is set out in full in the record beginning at page 69) discusses the grounds and evinces the thorough consideration given by the Commission to the interveners' evidence, briefs and arguments.

The order of dismissal is dated November 10, 1925.

The Commission, at that time, entered no final order on the original complaint of the M-K-T, but, as indicated in the report, awaited the result of the litigation in which this Court answered certain questions certified by the Circuit Court of Appeals for the Eighth Circuit (*Kansas City Terminal Railway Company et al.* v. *Central Union Trust Company of New York et al.*, 271 U. S. 445), and in which the Circuit Court of Appeals for the Eighth

Circuit, pursuant to this Court's answers, rendered a final decision on July 7, 1928. (*Kansas City Terminal Railway Company et al.* v. *Central Union Trust Company of New York et al.*, 28 F. (2d) 177.) After the opinion of the Circuit Court of Appeals was handed down, the Commission proceeded with the hearings on the M-K-T's complaint in order to determine the just compensation to be paid by the M-K-T "on the principle controlling compensation in condemnation proceedings," and finally as of November 13, 1933, handed down its report and final orders fixing the compensation. (*Missouri-Kansas-Texas Railroad Company* v. *Kansas City Terminal Railway Company*, 198 I. C. C. 4.) In this report it repudiates the so-called user basis for apportioning among joint users having equal rights of use the return to be paid the owner, and holds that the unit or numerical basis is the just and reasonable basis. The Commission says:

> "Both petitioner and respondent concede that just and reasonable compensation must include a reasonable return upon the fair value of those zones of the terminal which petitioner has acquired the right to use. Two methods of computing that return are urged upon us. Petitioner urges the user basis, by which is meant that petitioner should pay upon basis of the relation which its use of the terminal bears to the use by all the using carriers. This has been averaging somewhere in the neighborhood of 5 per cent. Respondent urges the numerical basis, that is, adjustment in relation to the number of users of the terminal regardless of the extent of the individual user by those lines. As there are 11 other users, petitioner's proportion under this basis would be one-twelfth.

"Petitioner contends that the numerical basis is grossly inequitable, and that there is nothing in the language of the statute or the decisions of this Commission or the courts which prevents measuring the compensation by the extent of the use. When analyzed, its position amounts to this, that respondent must hold its property in readiness at all times for the joint and equal use of petitioner, but that petitioner should be permitted to use the various zones if and when it may choose to do so, or not at all if it should so choose as to any particular zone, and to pay only for such use as it may actually make of the property." (l. c. 9.)

"The user basis as a method for determining the portion of the interest charge to be imposed upon petitioner finds no support in the principles governing compensation in condemnation cases, and in our opinion does not afford a just and reasonable basis. We conclude that the numerical basis in the circumstances of this case affords the just and reasonable method to be applied." (l. c. 11.)

Subsequent Events.

Following this decision, as appears from the statement contained in the brief for petitioners, the M-K-T requested and received the assent of the Terminal Company and the railroad companies, parties to the Operating Agreement and Stock Trust Agreement, to become a party to the Operating Agreement and Stock Trust Agreement as the successor of the old Missouri, Kansas and Texas Railway Company by the execution of supplemental Operating and Stock Trust Agreements, which will entitle it to use the facilities of the Terminal Company with all the privileges and subject to all of the obligations of the other railroad companies, parties to

the Operating and Stock Trust Agreements. Pursuant to this arrangement, the M-K-T has filed with the Interstate Commerce Commission (Finance Docket No. 10571) an application for authority, under Sections 1 (18), (19), (20), 5 (4), and 20a of the Interstate Commerce Act, to use the facilities of the Terminal Company upon the terms of the Operating Agreement, to assume the obligations thereby imposed upon the proprietary companies and to acquire stock of the Terminal Company, and has also filed in the original case brought before the Commission by the M-K-T against the Terminal Company (I. C. C. Docket No. 15682) an application for relief from compliance with the Commission's order of November 13, 1933, such relief to be effective upon the final execution and delivery of such supplemental Operating and Stock Trust Agreements.

Since petitioners have brought to the Court's attention these undisputed facts occurring since the filing of the original petition in mandamus, we think that there are several other occurrences of a similar nature which should also be mentioned, in order that the Court, so far as practicable, may have the present situation clearly before it.

On April 8, 1933 (before the final decision of the Commission in the M-K-T case), the receivers of the Wabash Railway Company notified the Terminal Company that, pursuant to the orders of the court of their appointment, giving them the right to affirm or disaffirm executory contracts of the company, they elected to disaffirm the Operating Agreement. Shortly thereafter, in May, 1933,

they filed an application before the Interstate Commerce Commission, similar to the application filed by the M-K-T in 1924, asking for the right to use certain of the facilities and for the determination of just compensation under Paragraph (4) of Section 3 of the Interstate Commerce Act. (*Walter S. Franklin and Frank C. Nicodemus, Jr., Receivers of Wabash Railway Company,* v. *Kansas City Terminal Railway Company,* I. C. C. Docket No. 25973.) On June 1, 1934, after the decision of the Interstate Commerce Commission in the M-K-T case, the receivers of Wabash Railway Company proposed to the Terminal Company that they be permitted to withdraw their disaffirmance of the Operating Agreement and dismiss the proceeding before the Interstate Commerce Commission. On June 19, 1934, the board of directors of the Terminal Company, by resolution, accepted this proposal. On July 9, 1934, the receivers applied to the Interstate Commerce Commission for an order dismissing the proceeding filed by them (I. C. C. Docket No. 25973 above referred to), and on August 21, 1934, the Commission entered an order dismissing the complaint in pursuance of the application.

On June 28, 1934, the trustees for the St. Louis-San Francisco Railroad Company (appointed by the District Court of the United States for the Eastern District of Missouri in Proceedings for the Reorganization of a Railroad under the Amendments to the Bankruptcy Act) filed with that court, in pursuance of a previous order giving them the right to elect to adopt or reject executory contracts, their election to adopt the Operating Agreement.

On July 1, 1934, Chicago, Milwaukee, St. Paul and Pacific Railroad Company, which, under a foreclosure de-

cree of the District Court of the United States for the Northern District of Illinois, had purchased the properties of Chicago, Milwaukee and St. Paul Railway Company (which decree, with subsequent extensions, gave the purchasing company until July 1, 1934, to elect to reject the agreements), voluntarily permitted the time to elapse within which it might have disaffirmed the Operating Agreement and Stock Trust Agreement, and thereby became bound by and a party to them.

The interveners, whose intervening petitions were dismissed by the Commission (R. 119), other than the petitioners, have done nothing further respecting their interventions since their dismissal. The petitioners in April and May, 1931, more than five years after their interventions were dismissed, filed before the Commission their petitions for rehearing. These were overruled on June 1, 1931. They did nothing further until May 31, 1933, more than seven years after their interventions were dismissed and shortly before the final report in the original M-K-T case, when they filed their petition for a writ of mandamus in the Supreme Court of the District of Columbia.

Organization of Terminal Company and Relations of Parties.

A brief account of the circumstances leading to and following the organization of the Terminal Company and the execution of the Operating Agreement and the Stock Trust Agreement will be helpful in understanding the issues.

In 1906, and for a long time prior thereto, the principal trunk lines of railroads entering Kansas City (except the petitioners) used a union depot located in the west bottoms of Kansas City near the Missouri-Kansas boundary line. The petitioners occupied a station owned by the Kansas City Southern. The old union depot was inadequate, and there had been an active and growing public demand for the construction of better facilities. This demand was reinforced by the desire and need of the carriers for more adequate facilities, not only for the accommodation of passenger traffic, but also for the interchange, transfer and handling of freight. Accordingly, negotiations were begun by the carriers among themselves and later by the carriers with the City of Kansas City. (R. 75, 76.)

The problem before the roads was not a simple one. Three different locations for the proposed new Union Station were suggested, one adjacent to the site of the then existing station, another in the east bottoms in the north end of Kansas City, and the third, the location finally selected. (R. 89.) Each of these locations had its advantages and disadvantages from a general operating standpoint. Each, likewise, had its advantages and disadvantages to particular carriers. For example, the Burlington, and to a lesser extent, the other railroads using its bridge across the Missouri River, decidedly preferred the site adjacent to the then existing station because of its location almost immediately at the end of the bridge and its convenience to the yards and facilities of the Burlington. On the other hand, the railroads entering the city from the east, and having trackage and

yards in the east bottoms, much preferred the north end site. The railroads entering the city from the south, and some of those entering from the east, and from the west along the Kaw River Valley, preferred the site finally selected. In order to compensate those roads, which would otherwise be put to a disadvantage by the site finally selected, and in order to induce them to become parties to the Operating Agreement, it was necessary to construct expensive facilities which would tend to overcome the disadvantages. For example, to take care of the Burlington and the other roads using the Burlington Bridge, it was arranged that a double track line should be constructed from a point near the Burlington Bridge around the west bluffs of Kansas City (and on a different level from the freight tracks covering the west bottoms in that immediate vicinity), which tracks would be devoted exclusively, except in emergencies, to the passenger traffic of these roads, thus bringing the station to the bridge as nearly as that could be accomplished. (R. 37.) In the case of several of the railroads entering the city from the west and northwest, including the Chicago Great Western, one of the petitioners in this case, it was necessary to construct an elevated line, costing several million dollars, in order that the passenger trains of these railroads might be brought into the station without the interruption which would necessarily result from their crossing the numerous freight tracks located in the lowlands in the westerly part of Kansas City and across the Kaw River in the State of Kansas. (R. 79, 80.) There were similar adjustments in connection with the construction of freight

facilities. Common yards for the care, repair and cleaning of passenger coaches and for the care, repair and cleaning of locomotives were constructed (R. 79), a number of common freight houses and team yards were constructed at advantageous points in the city (R. 80), and each of the railroads was given the absolute right (subject to the reasonable rules and regulations of the Terminal Company) to run its passenger and freight trains over each and every part of the facilities, as and when it chose to do so, for the full period of two hundred years. (R. 16, 17, 18, 77, 186, 188.)

In addition to advantages of location which the different railroads gave up in agreeing upon one or the other location, there were also tangible and financial sacrifices made. For example, while the present facilities of the Terminal Company constitute a belt around the entire city (with various branches leading in various directions), the main tracks are along the south side of the city, principally in what is known as the O. K. Creek Valley. (R. 79, 82A.) These tracks extend westwardly from the present Union Station across the Kaw River into the State of Kansas, and eastwardly a distance of about 6.5 miles to the eastern limits of Kansas City, Missouri. (R. 79.) The right of way acquired from the Kansas City Belt Railway Company was widened and additional land was acquired for the Union Station. The entire stock of the Kansas City Belt Railway Company, which owned this line, was in turn owned by the Atchison, Topeka and Santa Fe Railway Company, the Chicago, Milwaukee and St. Paul Railway Company and the St. Louis & San Francisco Rail-

way Company. These roads surrendered their stock to the common enterprise at book value and thus contributed, for the benefit of all the constituent lines, at a price of approximately $3,500,000, properties claimed to be worth about $9,000,000. (R. 89.) Other transactions of a similar character, but smaller in amount involved, could be mentioned. (R. 90.) By these transactions, various of the railroads conveyed to the Terminal Company properties, which they were at the time using individually and which could not have been taken from them for common use otherwise than by the power of eminent domain (as now exemplified by Paragraph (4) of Section 3 of the Interstate Commerce Act).

The different railroads were likewise affected differently in respect to the operating expenses of the Terminal Company by the location of the Union Station and other specific facilities. The closer a facility happened to be to the point of entrance of the tracks of a particular railroad into the city, the less trackage that railroad would have to use in reaching that facility and, consequently, the less proportion of operating expenses it would have to pay on the car mileage basis adopted in the Operating Agreement for the distribution of operating expenses. (R. 89.) The roads were establishing a common enterprise, were retaining an equal ownership in that enterprise, and each undertook an equal part of the investment and capital costs involved in the development of that enterprise. (R. 20, 21.)

As a result, the ten lines which used and owned the old Union Depot and owned the capital stock of the old

Union Depot Company caused the Terminal Company to be organized. (R. 76.) Each subscribed and paid for an aliquot part of its presently issued capital stock. Negotiations with the city culminated in the enactment of an ordinance (approved June 7, 1909) which provided for the vacation of certain streets and alleys, granted rights of way and generally covered the various municipal details necessary in the construction of a great terminal in a populous and growing city. (R. 76.) Among other things, the ordinance contained detailed and drastic provisions for preserving equality of opportunity to use the terminals by the various railroad companies, and provisions for preserving the right of other railroads to obtain the use of the facilities. (R. 83, 84.) At about this time the Operating Agreement, dated as of June 12, 1909, was entered into. (R. 14.) It provided for the construction of the new Union Station and all of the other facilities; for the joint and equal right in each of the signatory companies to run its trains over each and every part of the facilities for two hundred years (R. 17, 18); for the payment by each of the railway companies of an aliquot part of the interest on the Terminal Company's bonds, taxes and assessments on the Terminal Company's property and the principal of the Terminal Company's bonds at maturity (R. 20); for payment of the operating expenses of the Union Passenger Station by the respective companies in proportion to the number of cars and engines using the Union Station facilities (R. 25); for the payment by the respective companies of the operating

expenses of other portions of the terminal facilities on the basis of car mileage (R. 26); for the division equally among the proprietary companies of the net revenues of the Terminal Company obtained from rentals, concessions, switching, etc. (R. 26, 27); for the exclusion of defaulting companies from the privileges of the facilities (R. 34) (in which event the remaining companies would be obligated thereafter to pay the defaulting companies' portion of the interest and taxes (R. 21)); and for the pledging of the Operating Agreement with the trustee under the Terminal Company's mortgage, as further security for the bonds issued under the mortgage. (R. 16, 22, 39.) Early in 1910, these petitioners (the Kansas City Southern, upon its insistent demand, and the Chicago Great Western, by invitation (R. 89)), by supplemental agreement, became parties to the Operating Agreement, in every respect acquiring the same rights and assuming the same obligations as the original parties. (R. 47-50.)

Concurrently with the execution of the Operating Agreement in 1909, a Stock Trust Agreement was executed, by which the stock of the proprietary companies (which had been subscribed for by the ten railroad companies, and an equal amount of which was held by each) was deposited with a trustee in order to insure the equality of control contemplated by the Operating Agreement, not only for the benefit of the railway companies, but for the benefit of the holders of the $50,000,000 of bonds of the Terminal Company, to secure which the Operating Agreement was pledged. (R. 77, 120.) In

1910 the petitioners subscribed and paid for amounts of stock equal to those subscribed and paid for by each of the original parties to the Stock Trust Agreement, and, by Supplemental Stock Trust Agreement, became parties to the Stock Trust Agreement and subjected their stock to the Stock Trust Agreement in like manner as the original parties thereto. (R. 137-140.)

Thus all of the twelve trunk line railroads entering Kansas City, some of them theretofore the owners of properties which they dedicated to the common enterprise, became, in practical effect, the joint owners (through stock ownership and the control provided in the Operating Agreement) of the terminal facilities, which were constructed for the express purpose of accommodating them, and which consist, not only of a union passenger station, but of tracks running for several miles in every direction and belting the city, over which the trains of the proprietary companies can be brought to the station and to other parts of the facilities, freight tracks connecting all of the trunk lines with each other, freight stations, freight yards, a bridge across the Kaw River, an elevated line running through Kansas City, Kansas, and other comprehensive facilities, constituting a completely integrated and unified terminal. (R. 78-80.)

The Missouri, Kansas and Texas Railway Company (predecessor of the M-K-T), as well as the petitioners, was a party to these agreements. (R. 14, 120.) Some years after, the Missouri, Kansas and Texas Railway Company went into the hands of a receiver and its property was sold under a decree of foreclosure. The M-K-T was the purchaser at the sale as a result of a plan of

reorganization. (R. 71.) It succeeded in securing an adjudication by the courts that the obligations of the Operating Agreement and the Stock Trust Agreement did not run with the property and, therefore, would not automatically bind the purchaser at the foreclosure sale. (*Kansas City Terminal Railway Company et al.* v. *Central Union Trust Company of New York et al.*, 294 Fed. 32.) In accordance with the foreclosure decree so permitting (which was affirmed in the case above referred to), it elected to disaffirm the Operating Agreement and the Stock Trust Agreement (R. 71) and, upon making such election, brought the proceeding above referred to before the Interstate Commerce Commission to acquire the right of use and to have the compensation for such use ascertained under Paragraph (4) of Section 3 of the Interstate Commerce Act. This was the proceeding into which the petitioners, by their interventions, sought to inject themselves.

Pleadings in This Mandamus Case.

The petition for mandamus filed by the petitioners in the Supreme Court of the District of Columbia (R. 1-13) was answered by the respondents. (R. 157, 165, 184, 195.) The answer of this respondent appears at pages 184-192 of the record. By the answers the respondents admitted certain allegations of the petition and denied others. This respondent's answer specifically pointed out and denied a large number of conclusions asserted in the petition. It also appropriately raised the constitutional questions hereafter set out in this brief.

The petitioners demurred and the demurrers were overruled by the court. The petitioners elected to stand upon their demurrers, and, in consequence, the petition was dismissed by the court. (R. 194.)

The case, therefore, stands, not upon the allegations of the petition, but upon the allegations of the answers (including such parts of the petition as are admitted by all of the answers) and the stipulation as to certain formal facts made at the hearing. (R. 195.)

(Throughout the brief italics used in quotations are ours unless otherwise noted.)

SUMMARY OF THE ARGUMENT.

1. The Interstate Commerce Commission is not an omnipotent sovereign, but an administrative body possessing only the powers conferred by Congress. No section of the Interstate Commerce Act, either expressly or by necessary implication, confers upon the Commission any power to set aside the Operating Agreement and Stock Trust Agreement between the Terminal Company and its twelve proprietary companies, or to order the companies, parties to it, to pay to the Terminal Company, on account of the interest and taxes payable by the Terminal Company, any greater or less sums than those provided in the Operating Agreement. The division of interest and taxes among the proprietary companies is the result of a settlement of property rights as between the railroad companies, of which the organization of the Terminal Company was a part, is strictly proprietary in its nature, and has no relation to rates, fares and charges for transportation. It is beyond the power of the Commission to disturb.

2. The discrimination provisions of the Interstate Commerce Act bear only upon carriers *as such*. They have no bearing upon the strictly proprietary acts or status of railroad companies. Paragraph (1) of Section 3 applies only to shippers. Paragraph (3) of Section 3 applies to railroad companies, only in the respects specifically mentioned in it, and, so far as amounts col-

lected by one carrier from another carrier are concerned, only to collections or exactions of rates, fares and charges.

3. Paragraph (4) of Section 3 is obviously inapplicable, because petitioners are already entitled to the use of the facilities, and, therefore, are not of the class for which this paragraph provides a remedy.

4. The fact that other sections of the Act give extensive powers over the carriers in the respects named in such sections does not further extend those extensive powers to the control of carriers in respects not named in the Act.

5. To construe the Act in the manner claimed by petitioners would raise grave constitutional questions. This is a sufficient reason for avoiding such construction, even if a contrary construction were not plainly demanded by the language of the Act. In fact, the construction claimed would render the Act so applied unconstitutional.

6. Even though it be admitted, for the sake of the argument, that the proper construction of the Act is doubtful, mandamus will not lie. It is the duty of the Commission as an administrative agency of the government to construe the Act as to the scope and application of its powers. The Commission has not denied its jurisdiction to remove discriminations. Its holding that it has no power by virtue of these provisions to disturb the pro-

prietary relationships of the railroads under contracts of the nature of those involved is not a denial of jurisdiction, but an exercise of jurisdiction. Furthermore, the Commission, notwithstanding its opinion that it had no power to disturb these contracts, considered the contentions of the petitioners and held that, on the facts as disclosed in the record, no discrimination within the intent and meaning of the Interstate Commerce Act had been practiced against the petitioners. This was a finding upon the merits which would preclude mandamus, even if mandamus would otherwise lie.

7. The petitioners' interventions before the Commission unduly broadened the issues, their present contentions present a moot case, and the petitioners should be barred by laches.

ARGUMENT.

I.

The Commission Has No Power under the Interstate Commerce Act or Any Other Act of Congress to Grant the Relief Asked by Petitioners' Intervening Petitions.

If the Commission had no power to grant the relief prayed, then obviously it was right in dismissing the intervening petitions.

In considering the power of the Commission in this respect, certain fundamentals must be borne in mind.

(1) The Interstate Commerce Commission is an administrative agency of the government. (*United States* v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 282 U. S. 311, 324; *Interstate Commerce Commission* v. *Humboldt Steamship Company*, 224 U. S. 474, 484; *W. A. Hover & Co.* v. *Denver, etc., R. R. Co.*, 17 F. (2d) 881, 884 (C. C. A. 8).) It can exercise only such powers as are given by statute, either expressly or by clear implication. (*Chesapeake & Potomac Telephone Company* v. *Manning*, 186 U. S. 238, 248; *Interstate Commerce Commission* v. *Los Angeles*, 280 U. S. 52, 67, 68, 69, 70, 71; *Interstate Commerce Commission* v. *Oregon-Washington River Navigation Company*, 288 U. S. 14, 35.)

(2) The petitioners, by their interventions in the M-K-T case, have, in effect, asked this administrative agency of the government to set aside a contract, by which twelve railroad corporations undertook to settle

their proprietary rights in the Terminal Company's property and in its use for two hundred years, and on the faith and security of which the bonds of the Terminal Company were issued and sold to the public. (See especially Section 2 of Article I, Section 1 of Article II, and all of Article V of the Operating Agreement. (R. 21, 25, 49.)) They are not asking the Commission to regulate any activity of the Terminal Company as a common carrier, but they are asking that the terms of this contract, upon which its very existence depends, without which its first mortgage bonds would be of little value, and by which the property rights of the various companies in its facilities are established, shall be utterly disregarded.

(3) The destruction of these property and contract rights, if not plainly in violation of the Fifth Amendment, certainly raises grave constitutional questions.

(4) The authority to destroy these property and contract rights must be found in the language of the Interstate Commerce Act, or some other act of Congress. The power must be conferred in express language or by necessary implication. Vague generalities are not sufficient. It cannot be presumed that Congress intended to defy the Constitution. Only the plainest language, expressing the intent of Congress, should be construed to delegate such an authority to the Commission. (*United States* v. *Delaware & Hudson Company*, 213 U. S. 366, 407; *State of Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, 217; *Federal Trade Commission* v. *American Tobacco Company*, 264 U. S. 298, 306; *Lewellyn* v. *Frick*, 268 U. S. 238,

251; *Interstate Commerce Commission* v. *Oregon-Washington R. Co.* 288 U. S. 14, 40.)

It, therefore, behooves us to examine the provisions of the Interstate Commerce Act, which are supposed to grant this extraordinary power.

In petitioners' brief they claim that their interventions were justified by Paragraphs (1), (3) and (4) of Section 3 (49 U. S. C., Secs. 3 (1), 3 (3), 3 (4)) and "other sections of the Interstate Commerce Act." While petitioners, at pages 28, 29 and 33 of their brief, quote the language of Paragraphs (1) and (3) and the pertinent part of Paragraph (4), in their argument they disregard the language. They prefer to deal in vague generalities regarding preferences and discriminations. The exact language of these paragraphs is essential to clear thinking.

PARAGRAPHS (1) AND (3) OF SECTION 3.

Paragraph (1) of Section 3 (U. S. C., Title 49, § 3 (1)) is as follows:

> "(1) That it shall be unlawful for any *common carrier* subject to the provisions of this act to make or give any undue or unreasonable *preference* or advantage *to any particular person,* company, firm, corporation, or locality, or any particular description of *traffic,* in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

Paragraph (3) of Section 3 (U. S. C., Title 49, § 3 (3)) is as follows:

> "(3) All *carriers,* engaged in the transportation of passengers or property, subject to the provi-

> sions of this act, shall, according to their respective powers, afford all reasonable, proper, and *equal facilities for the interchange of traffic* between their respective lines, and for the receiving, forwarding and delivering of passengers or property to and from their several lines and those connecting therewith, and *shall not discriminate in their rates, fares and charges between such connecting lines, or unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper.*"

When read together, the intent of these provisions is plain.

Paragraph (1) obviously applies only to shippers. Paragraph (3) applies only to other carriers. Paragraph (1) has no application to other carriers. Paragraph (3) has no application to shippers. Both paragraphs have been in the Act since its passage in 1887 in their present form, except that the Transportation Act of 1920 eliminated the last clause of Paragraph (3) as originally written, reading as follows:

> "but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." (24 St. L. 380.)

and added the new Paragraph (4) as well as the present language in Paragraph (3) prohibiting discrimination in the distribution of traffic not specifically routed by the shipper. The evident purpose of eliminating the former language was to remove the possible inconsistency with the new Paragraph (4), which was added to the Act at the same time.

That Paragraph (1) was intended to protect shippers, not other carriers, is plain from the decisions of the courts and of the Commission.

In *Texas & Pacific Railway Company* v. *United States*, 289 U. S. 627, this Court says:

> "The purpose of Sections 2, 3, and 4 (49 U. S. C. A., Secs. 2-4), as exhibited by committee reports and explained by those in charge of the bill in Congress, was to prevent unjust discrimination resulting from existing practices. Similar commodities were, without reason or excuse, carried at different rates. Shippers similarly situated were put on unequal terms. Producers and consumers at points of origin and destination were prejudiced by unequal treatment in the matter of rates or service. Obviously, localities of origin or destination might also be prejudiced by undue discrimination. One of the most prevalent and reprehensible practices at which the act was aimed was the charging of a less or an equal rate for a longer haul upon the same line or route. *The act was passed for the protection of those who pay or bear the rates. The standards it establishes are transportation standards, not criteria of general welfare.*" (l. c. 638.)

In *Oregon Short-Line Railway Co.* v. *Northern Pacific Railroad Company*, 61 Fed. 158 (C. C. A. 9), Mr. Justice McKenna, then circuit judge, said, with reference to this paragraph:

> "The first part of this section prohibits preference to persons, firms, or corporations, and to localities and traffics, and prohibits the subjecting of either to prejudice or disadvantage. The evidence shows that there was no preference given any person, firm, or corporation in the sense of this section, and no traffic or locality is complaining,

unless the complaint of appellant is such. But we do not think it is competent for a railroad company to appropriate the grievance of a traffic or locality under Section 3, and complain on account of it." (l. c. 159, 160.)

In *Delaware, etc., Railroad Company* v. *Kutter,* 147 Fed. 51 (C. C. A. 2), the court says:

"The wrong prohibited by the section is a discrimination between shippers." (l. c. 63.)

In *Oklahoma-Arkansas Telephone Company* v. *Southwestern Bell Telephone Company,* 183 I. C. C. 771, the Interstate Commerce Commission in its report says:

"The legislative history of this paragraph of Section 3 appears to support the view that discrimination between shippers was the only thing aimed at. If this were not so, the provisions of Section 3 (3), which specifically prohibit discrimination between carriers of passengers or property, would seem to be superfluous. We are constrained to hold, therefore, that a situation of prejudice or preference between common carriers is not comprehended by the provisions of Section 3 (1)." (l. c. 774.)

As the Commission says in the case last cited, the legislative history of the Interstate Commerce Act confirms this interpretation.

Senator Cullom, chairman of the committee having charge of the original bill, said, with reference to Section 3, in presenting and explaining the bill:

"The first paragraph prohibits the giving of any due or unreasonable preference to any particular

person or locality or to any particular description of traffic in any respect whatever." (Congressional Record, Vol. 17, 49th Congress, First Session, April 14, 1886, p. 3472.)

In the Senate Committee Report (Report No. 46, 49th Congress, First Session, page 215, the following was said:

"The provisions of the bill are based upon the theory that the paramount evil chargeable against the operation of the transportation systems of the United States as now conducted is unjust discrimination between persons, places, commodities or particular descriptions of traffic. The underlying purpose and aim of the measure is the prevention of these discriminations."

In *Discontinuance of Inland Stations in New York City,* 173 I. C. C. 727, the Commission says with reference to Paragraph (1):

"There is no merit to this contention. The wrong prohibited by Section 3 is a discrimination between shippers." (l. c. 738.)

Paragraph (3) on the other hand, by its terms, applies to carriers. It applies to carriers, however, only in the specific relations described.

Senator Cullom, in his presentation and explanation of the bill above referred to, had the following to say about Paragraph (3) of Section 3:

"Its purpose is to require railroads to furnish connecting roads, all reasonable and proper facilities for the interchange of traffic that may be necessary for the convenience of the public, and to prevent one road or a combination of roads 'from freez-

ing out' connecting lines by refusing to accept from it or deliver traffic to it upon any terms, as has been done." (Congressional Record, Vol. 17, 49th Congress, First Session, April 14, 1886, p. 3472.)

Paragraph (3) consists of two mandates and two prohibitions.

The first mandate is that all carriers shall afford to others reasonable, proper and equal facilities for the interchange of traffic between their respective lines. There is no pretense that this mandate has been violated by this respondent. There has been no complaint whatever in regard to this respondent's facilities for the interchange of traffic, or the manner in which it affords them to other carriers.

The second mandate is that carriers shall afford reasonable, proper and equal facilities for the receiving, forwarding and delivering of passengers or property. There has likewise been no complaint in this respect.

Coming to the two prohibitions, and considering the last one first, it is that the carriers shall not "unduly prejudice any such connecting line in the distribution of traffic that is not specifically routed by the shipper." There is no contention that this respondent has ever prejudiced any connecting line in the respect named.

The other prohibition is that carriers "shall not discriminate in their rates, fares and charges between such connecting lines." It is this clause only upon which petitioners must hang their case. They must contend, and apparently do, that the phrase "charges between such connecting lines" includes the payments under the Operating Agreement for interest and taxes

made by the proprietary companies by reason of their ownership and control of the Terminal Company and its facilities.

The language on its face shows that it has no reference to capital investments or interest and taxes upon investments. Such obligations, even if they were "charges," are not "between such connecting lines." They are payments made on account of a vested proprietary right in physical facilities and their use. "Connecting lines" means connecting carriers *as carriers.* The proprietary railroad corporations are connecting lines only in the respect that it is necessary for them to connect in order to get the use of the physical facilities which they own.

Furthermore, the words "rates, fares and charges," even divorced from their context, mean, in the ordinary acceptation of the English language, sums collected or imposed for transportation. If there were any doubt otherwise, the context makes it clear that this is its meaning. The clause immediately preceding relates to "the receiving, forwarding and delivering of passengers or property to and from their several lines," and the clause following clearly refers to rates, fares and charges for "the receiving, forwarding and delivering of passengers or property to and from their several lines."

Any possible doubt is dissipated by reading the rest of the Interstate Commerce Act. In every case where the words "rates, fares and charges" are used, they mean rates, fares and charges directly connected with transportation. On the principle of *ejusdem ge-*

neris, the word "charges" means charges of the same character as the rates and fares previously referred to, and whenever it is used separately, it is used in this sense. In other places throughout the act, sometimes the three words "rates, fares and charges" are used together. Sometimes the words are used separately. When used separately, the word "rates" will be found to refer always (except in Section 15 (a) where it is expressly provided that the word shall be deemed the equivalent of the words "rates, fares and charges") to rates for the carriage of freight; the word "fares," to rates for the carriage of passengers; and the word "charges," either to rates for the carriage of freight, rates for the carriage of passengers and incidental exactions combined, or sometimes to incidental exactions directly related to transportation, such as icing charges, storage charges, demurrage charges, etc. When used in the latter sense, it is usually accompanied by a word descriptive of the character of the exactions, such as "icing," "storage," "demurrage," etc.

The following are some of the sections where one or more of these phrases occur: Section 1 (4), (5) and (6); Section 2; Section 3 (2) and (3); Section 4 (1) and (2); Section 6 (1), (2), (3), (7) and (11); Section 10 (1), (2) and (3); Section 13 (3) and (4); Section 15 (1), (3), (6) and (13); Section 15 (a).

Wherever rights in or the use of physical facilities are involved, the word "terms" or the word "compensation" is used, *e. g.*, in Paragraph (15) of Section 1, relating to emergency requirements for the joint use of terminals, the phrase is: "And upon such *terms* as be-

tween the carriers as they may agree upon or, in the event of their disagreement, as the Commission may after subsequent hearing, find to be just and reasonable." In Paragraph (4) of Section 3, the phrase is: "And for such *compensation* as the carriers affected may agree upon or, in the event of a failure to agree, as the Commission may fix as just and reasonable."

That Section 3 applies only to railroads in their capacities as common carriers, and not to railroads in the exercise of their proprietary rights, is made plain by a series of decisions of this Court contrasting the obligations of railroads as common carriers and their rights as private property owners.

A leading case is *Donovan* v. *Pennsylvania Railroad Company*, 199 U. S. 279, where it was held that a railroad company could make an exclusive contract with a bus and transfer company and that it need not extend similar facilities to hack drivers generally because it owed no duty, either at common law or by statute, to such hack drivers. The doctrine of this case is firmly established by the decisions of this Court in *Delaware, Lackawanna & Western R. R. Co.* v. *Town of Morristown*, 276 U. S. 182, and *Black and White Taxicab Company* v. *Brown and Yellow Taxicab Company*, 276 U. S. 518.

See, also, *Express Cases*, 117 U. S. 1 (exclusive contract with express company); *Railroad Company* v. *Pullman Company*, 139 U. S. 79 (contract with sleeping car company); *Santa Fe, Prescott & Phoenix Railway Co.* v. *Grant Brothers Construction Co.*, 228 U. S. 177 (trans-

portation of contractor's outfit); *Clough* v. *Grand Trunk Western Ry. Co.*, 155 Fed. 81 (transportation of circus); *Sager* v. *Northern Pacific R. R. Co.*, 166 Fed. 526 (transportation of circus); *Matter of Railroad-Telegraph Contracts*, 12 I. C. C. Rep. 10, 11 (contract with telegraph company); *Merchants Cotton Press & Storage Company* v. *I. C. R. Co.*, 17 I. C. C. 98 (cotton compress service); *Southwestern Produce Distributors* v. *Wabash R. Co.*, 20 I. C. C. 458; *Andrews Brothers Company* v. *Pennsylvania R. Co.*, 38 I. C. C. 165 (auctions at terminal freight house); *Andrews Brothers Company* v. *Pennsylvania R. Co.*, 123 I. C. C. 733; *Williams Thompson Company* v. *A. & W. RR.*, 126 I. C. C. 417 (lease of warehouse); *Uniform System of Accounts*, 171 I. C. C. 557 (coal mines).

In like manner, a railroad company owes no duty to buy railroad equipment from all the manufacturers of railroad equipment, because it has bought from one. It owes no duty to pay Smith a certain price for the coal bought from him because it has already paid that same price to Jones. It owes no duty to sell Brown a worn-out locomotive because it has sold White a worn-out locomotive. The proposition is so obvious that further illustrations would be superfluous.

> "There is no doubt that common carriers subject to the Interstate Commerce Act may have activities which lie outside the performance of their duties as common carriers and are not subject to the provisions of the Act." (*Kansas City So. Ry.* v. *United States*, 282 U. S. 760, l. c. 764.)

Counsel rely upon expressions in opinions of this court to the effect that railroads as well as shippers are

entitled to impartial treatment. Such language, of course, must be read in its context. In no case has the court held that one railroad company owes a duty of impartiality to other railroad companies in its proprietary relationships with them, any more than it has held that a railroad company owes a duty of impartiality to merchants in its proprietary relationships with *them*.

A brief reference to some of the cases cited by petitioners will demonstrate their inapplicability.

In *Pennsylvania Company* v. *United States*, 236 U. S. 351, cited by petitioners, the discrimination was with respect to the specific duties imposed upon the carrier by Paragraph (3) of Section 3.

In *Louisville & Nashville Railroad Company* v. *United States*, 238 U. S. 1, the discrimination was with respect to "a particular description of traffic," which falls expressly within the inhibition of Paragraph (1) of Section 3.

In the *Chicago Junction Case*, 264 U. S. 258, the language quoted by petitioners was used by the court in discussing the question whether the petitioners had the legal interest necessary to entitle them to challenge the order. The case did not involve Section 3 at all. It originated with an application by the New York Central under Paragraph (18) of Section 1 and Paragraph (2) of Section 5 for authority to acquire the capital stock of the Chicago River and Indiana Railroad (which would lease the Chicago Junction Railway), and to extend its line by the use of such facilities. The Commission

granted the application. The District Court, without opinion, dismissed the bill brought by the Baltimore & Ohio and other lines for an injunction. In this Court it was asserted that the plaintiffs had not the legal interest to entitle them to maintain a suit questioning the validity of the other. This Court held that the plaintiffs, as competitors of the New York Central and users of the terminal railroads involved, and as parties in the original case before the Commission, had a special interest, and, therefore, could maintain the suit. The decree of the District Court was reversed, because this court held that the bill alleged sufficient facts regarding the insufficiency of the evidence before the Commission to render the order of the Commission void. The case was, therefore, sent back to the District Court for a hearing on the merits.

Chicago, I. & L. Railway Co. v. *United States,* 270 U. S. 287, is a typical case of discrimination under Paragraph (3) of Section 3. The Lake Erie refused to establish with an electric railroad through routes or joint rates for interchange switching charges. We quote from this Court's discussion of the effect of the Interstate Commerce Commission's order:

> "* * * The order directed the steam railroads to remove the unjust discrimination which the Commission found was being practiced against an electric railroad, which also entered that city, by refusal to switch its interstate carload traffic and to make arrangements with it for reciprocal switching." (l. c. 290.)

Transit Commission v. *United States*, 289 U. S. 121, did not involve Section 3 at all. It arose under Paragraph (18) of Section 1. The Commission did not exercise jurisdiction to prevent any alleged discrimination. No discrimination was even claimed. It exercised jurisdiction under the express authority of Paragraph (18) of Section 1, which precludes a carrier from extending its line without first securing the authority of the Commission. The Commission held that the extension of a line, by making a trackage contract instead of acquiring title, came within the Act. The Commission, therefore, was interested in the terms upon which the carrier would acquire such trackage rights, just as it would be interested in the price which the carrier might pay to acquire title to a proposed extension.

The language of Paragraph (4) demonstrates that the general language of Paragraphs (1) and (3) is not to be given any such strained interpretation as appellants seek to give it, for Congress in Paragraph (4) has specifically recognized that equality in compensation and terms for the use of facilities is not necessary, but that the carrier owning the facilities may agree on the terms with the other carrier or carriers involved. In fact the Commission's jurisdiction to fix the compensation is made expressly contingent on the carriers not being able to agree. If they do agree, the Commission has no power to proceed further, no matter what variance there may be between the compensation paid by the different carriers.

If Paragraph (4) opened the terminals of all carriers to all other carriers at the pleasure of the latter,

there might be some excuse for contending that the anti-discrimination provisions of Paragraphs (1) and (3) applied. But Congress has done no such thing. Paragraph (4) recognizes that no carrier holds itself out as a furnisher of terminal facilities to all the world, but that its facilities are private property which can be taken by its competitors only upon payment of just compensation. It therefore requires, not the payment of rates for a common carrier service, but the payment of just compensation for property taken. And before the owner can be disturbed in any way, it provides that the Commission must find its disturbance to be in the public interest; and, before the Commission can fix the compensation, it provides that the owner and the proposed user must have failed to agree. In other words, Paragraph (4), instead of prohibiting discrimination, affirmatively contemplates differences in treatment. The public interest might call for the use by one carrier but not by another—a difference. The Commission might require the use by two carriers, and the owner might agree as to the compensation with one and not with the other. The Commission then, following the mandate of the statute, might fix the compensation to be paid by the other carrier at a less or greater sum than that agreed to between the owner and the first carrier—again, a difference.

The fact is that Paragraph (4) fixes in plain language the conditions under which the Commission can take jurisdiction and the methods to be followed in fixing the compensation, if jurisdiction is assumed.

These provisions are exclusive, and Paragraphs (1) and (3) have no bearing on them whatever.

It is plain that no authority for the annihilation of the Operating Agreement and of the security for this company's bonds is to be found in Paragraphs (1) and (3) of Section 3.

PARAGRAPH (4) OF SECTION 3.

Petitioners also rely upon Paragraph (4) (U. S. C., Title 49, §3(4)). The pertinent part of Paragraph (4) is as follows:

> "(4) If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of *a carrier owning or entitled to the enjoyment of terminal facilities* to handle its own business, it shall have power to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any carrier, *by another carrier* or other carriers, on such terms and for such compensation *as the carriers affected may agree upon,* or, *in the event of a failure to agree, as the Commission may fix as just and reasonable* for the use so required, to be ascertained *on the principle controlling compensation in condemnation proceedings.* Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced." (Italics ours.)

Paragraph (4) was added to the Interstate Commerce Act by the Transportation Act of 1920 (41 Stat. L. 479). The purpose of Congress, as declared in the latter Act (see 41 Stat. L. 488), was to enable the railroads as a whole to furnish adequate transportation service to the public, not to serve the interests of individual car-

riers, nor to provide for arbitration of disputes growing out of contractual relationships between carriers. (See *Wisconsin Railroad Commission* v. *Chicago, Burlington & Quincy Railroad Company*, 257 U. S. 563, 585, 589; *New England Divisions Cases*, 261 U. S. 184, 189; *Dayton-Goose Creek Railway Company* v. *United States*, 263 U. S. 456, 478.) That Paragraph (4) was intended to cover the field and furnish an exclusive and effective remedy is shown by the elimination at the same time of the following language formerly contained in Paragraph (3), upon which had been built up a large body of judicial decisions establishing the rights of railroad companies to the exclusive use of their own facilities and the lack of power in the Commission to interfere therewith:

> "but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." (24 Stat. L. 380.)

Paragraph (4) requires no interpretation. By its terms, it has no application unless the parties themselves have been unable to agree.

The right to invoke its provisions is extended only to carriers *other* than the carrier owning or entitled to the enjoyment of terminal facilities. A carrier already entitled to the enjoyment of the terminal facilities is thus by direct implication excluded from the category of carriers for whom the enjoyment of the use may be commandeered.

And, even where the use is condemned for the benefit of a carrier not already entitled to its enjoyment, the jurisdiction of the Commission *to fix the compensation*

is, by the express language of the statute, wholly excluded where the carriers agree between themselves. The Commission in such case may require the use, but only "on such terms and for such compensation as the carriers affected may agree upon, *or, in the event of a failure to agree,* as the Commission may fix, etc." The failure to agree is thus an express condition precedent to the exercise by the Commission of the power to fix the compensation.

The power of the Commission to determine the terms and compensation for the use, therefore, is confined to those cases where one of the carriers is not entitled to the use and where the carriers have not been able to agree between themselves, either by prior contract or by agreement after the use has been ordered.

The language of Paragraph (4) is not confined to those cases where a condemnation petition is filed by a carrier. The Commission has the power of initative. It can itself order the use, and then proceed, in the exercise of the power of eminent domain, to fix the compensation if the parties do not agree. If Congress had intended to authorize the Commission to fix the compensation for carriers already bound by contract to a different compensation, Congress would not have limited the power of the Commission in the fixing of compensation to those cases where the parties fail to agree, because the parties, if satisfied between themselves with their contract, could completely checkmate any action initiated by the Commission. All they would have to do, after the Commission had ordered the use, would be to agree again

upon the compensation to which they had already agreed in the contract.

If Congress had intended to give the Commission the power to set aside contracts already made, and to fix the compensation, regardless of such contracts, it would have made such intention clear, and it would not have left it to be extracted by a process of refined reasoning from provisions which are appropriate for ordinary proceedings in eminent domain as between parties who are unable to agree, and are wholly inappropriate to the fixing of compensation by the Commission in disregard of the agreements of the parties.

To paraphrase the language of Mr. Justice Holmes in *Davis* v. *Pringle,* 268 U. S. 315, 318: It is incredible that, after the use of language appropriate to parties not under contract with each other, Congress should have intended to smuggle in a provision to destroy solemn contracts of a proprietary nature by muffled words.

Congress, in the Transportation Act, met a practical situation in a practical way. It knew that many of the railroads of the country had extensive terminals which other companies could not use, and which the public interest might require to be shared. It also knew that there were many other terminals, including all of those owned by the so-called terminal companies, which were already used by a number of carriers under long-time contracts, upon the credit of which bonds had been issued and sold to the public. Congress recognized that the public interest might require that the first class of terminals be opened up to other carriers. The second class were already opened up to other carriers to the

extent of the contracts already in effect, and could be opened up still further to accommodate other carriers not having the benefit of such contracts. The language used is appropriate to this end. It is not appropriate to any other.

It shows that the *intention of Congress* was to give the Commission power, when it found it in the public interest, to require the joint use of terminals, where no previous arrangement for such use existed and the parties themselves were unable to agree. Congress just as plainly did not intend to authorize the Commission to step in where contracts were already in effect providing for the joint use of terminal facilities and the carriers interested were actually making joint use of such facilities—merely because one or more of the carriers might think that the contract which it had made was, perhaps, not as favorable to it as some other contract might have been. Congress intended that the Commission should be in a position *to secure for the public the requisite service.* It did not intend to make the Commission a court of equity to reform existing contracts nor a court of law to settle disputes between the carriers growing out of such contracts.

In what situation are the petitioners?

Each of them is already entitled to the use of the facilities by virtue of a contract effective for a period of two hundred years. (R. 14, 17, 47, 48.) By virtue of the Operating Agreement, the franchise ordinance which is referred to in the Commission's report (R. 76), the equitable ownership of the stock of the Terminal

Company and the unity of ownership and control effected by the Stock Trust Agreement (R. 120, 137), each of them is also in practical effect the owner of an undivided interest in the entire property of the Terminal Company. In view of the elaborate character of the organization and machinery for control, the Terminal Company somewhat resembles a corporate trustee, holding legal title to the property, with the equitable title in the proprietary companies. (Cf. *Chicago, Milwaukee & St. Paul Railroad Company* v. *Des Moines, etc., Railway Company,* 254 U. S. 196.)

It is plain that neither of the petitioners (themselves proprietary companies) can be classed as "another carrier," to which Paragraph (4) of Section 3 gives the Commission power to extend the use of terminal facilities.

It follows that the Commission has no power to fix the compensation to be paid by them. Its power in fixing compensation is limited to those cases where it requires the use. Where the parties already have the right of use, the statute is silent as to any right to fix compensation. The appellants, therefore, do not come within the class of carriers for which the Commission has the power to fix the compensation to be paid.

If Congress had intended to give the Commission any such power, it would have been perfectly simple to use appropriate language for that purpose. It would have been provided expressly, first, that the Commission should have the power to require the joint use of termi-

nal facilities by any carrier whether previously entitled thereto or not, and also the power "to revise, readjust or ignore all existing contracts between carriers relating to terminal facilities, and to prescribe the terms and conditions upon which such carriers shall make joint use of the facilities owned by either or all of such railroads, or to the enjoyment of which either or all of such railroads by contract may be entitled, including the payments to be made and the services to be performed by either or all." Congress would not have left such extraordinary powers to be inferred from general language. If Congress had intended to destroy solemn contracts, without compensation, it would have made that intention plain.

This Court, in a number of quite recent cases, has made it clear that while the Transportation Act inaugurated a new policy and greatly enlarged the powers of the Commission, it enlarged them only with respect to the matters regarding which specific authority is conferred by the amendments. It did not authorize the Commisson to create for itself new powers merely because it might conceive they were in line with the declared policy of the Transportation Act.

> "But the Commission, exercising a delegated regulatory authority which does not have the freedom of ownership, operates in a field limited by constitutional rights and legislative requirements." (*Atchison, Topeka and Santa Fe Railway Company* v. *United States,* 284 U. S. 248, 262.)

Specific authority must be found in the Interstate Commerce Act to authorize the Commission to impose

unusual burdens on carriers by unusual methods. General language is not sufficient.

In *Interstate Commerce Commission* v. *Los Angeles*, 280 U. S. 52, this Court held that the Interstate Commerce Commission had no power to require the construction of a union station by railroad companies. After various attempts to bring about the construction of a union station, the City of Los Angeles brought a proceeding before the Interstate Commerce Commission, asking that the railroads be ordered by the Commission to construct and use such a station. The Commission held that it was not empowered by Congress to make such a requirement. This Court denied mandamus. The Court construed various general provisions of the Act, which it was claimed conferred the power, and held that a power of this character, affecting as it would the important property interests of the railroads, must rest upon express language, and that it could not be fabricated out of general expressions. This Court says:

> "In weighing the effect of the Transportation Act, it should be noted that in this important measure affecting associations between interstate carriers of a compulsory character, *there is nowhere express authority for the establishment of union passenger stations, compulsory or otherwise.*" (l. c. 67.)
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> "The Commission was created by Congress. If it was tc be clothed with the power to require railroads to abandon their existing stations and terminal tracks in a city and to combine for the purpose of establishing in lieu thereof a new union station, at

a new site, *that power we should expect to find in congresional legislation.*" (l. c. 68.)

* * * * * * *

"If Congress had intended to give an executive tribunal unfettered capacity for requisitioning investment of capital of the carriers and the purchase of large quantities of land and material in an adverse proceeding, we may well be confident that Congress would have made its meaning far clearer and more direct than in the present meager provisions of the Transportation Act. *The suggestion of complainants is that* out of provisions for local union of main tracks and switching tracks *we should use our imaginations and develop them into provisions for giant union passenger stations.*" (l. c. 70.)

Interstate Commerce Commission v. *Oregon-Washington River Navigation Company,* 288 U. S. 14, involved an order of the Interstate Commerce Commission, which required the Oregon-Washington River Navigation Company "to extend its line of railroad now terminating near Burns, Oregon, from or near a station thereon designated as Crane, Oregon, to a connection with the Cascade Line of the Southern Pacific Company at or near Crescent Lake, Oregon." (l. c. 22.) The Court held that the order exceeded the Commission's powers and should, therefore, be set aside. The Commission had based its order upon Paragraph (21) of Section 1 of the Transportation Act (U. S. C., Tit. 49, Sec. 1 (21)), which, along with Paragraphs (18) to (20) of Section 1, forbidding extensions, construction of new roads or abandonments without the order of the Commission, was added by the Transportation Act of 1920. (41 Stat. L. 456, 476.) By Paragraph (21) the Commission was given power to require any carrier "to pro-

vide itself with safe and adequate facilities for performing as a common carrier its car service, as that term is used in this chapter, and to extend its line or lines." The court held that the phrase, "and to extend its line or lines," must be construed in its context, that the extensions mentioned had to do with car service, and that the clause was not intended to create a wholly independent subject of jurisdiction. This Court says:

> "• • • In the proviso the furnishing of facilities and extension of lines are blended as belonging in a single class. We should expect, *if Congress were intending to grant to the Commission a new and drastic power* to compel the investment of enormous sums for the development or service of a region which the carrier had never theretofore entered or intended to serve, *the intention would be expressed in more than a clause in a sentence dealing with car service.*" (l. c. 35.)
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> • • • • • • •
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> "Moreover, if the purpose were that claimed by the Commission, support should be found in legislative history. But none has been called to our attention." (l. c. 35.)

In *State of Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, it was held that Paragraphs (18) to (20) of Section 1 of the Interstate Commerce Act did not authorize the Interstate Commerce Commission to control the abandonment of an intrastate railroad, whose situation and ownership were such that interstate and foreign commerce could not be burdened or affected by a discontinuance of its business. This court says, with reference to the paragraphs of the act relied on:

"As a whole these acts show that what is intended is to regulate interstate and foreign commerce and to affect intrastate commerce only as that may be incidental to the effective regulation and protection of commerce of the other class. * * * And *had there been a purpose here to depart from the accustomed path* and to deal with intrastate commerce as such independently of any effect on interstate and foreign commerce, *it is but reasonable to believe that that purpose would have been very plainly declared.* This was not done." (l. c. 217, 218.)

Furthermore, it is apparent from reading the appellants' intervening petitions that they are not really seeking a remedy under Paragraph (4) of Section 3. They do not want an order requiring their use of the facilities and the ascertainment of compensation "on the principle controlling compensation in condemnation proceedings." They want something very different. They want a revision of the Operating Agreement and a readjustment and reapportionment of the fixed charges among the various proprietary companies. They ask for an order which will place the use and terms of use "on a fair, just and equitable basis among such parties in accordance with and in proportion to the use made thereof by the various parties." (Intervening petition of the Kansas City Southern, R. 63, 69.)

In fact, counsel for Chicago Great Western conceded before the Commission that Section 3 (4) was inapplicable. In their brief on the exceptions to the report of the examiner they said:

"It is true that these interveners do not rely at this stage of this proceeding upon Section 3 (4) of

the Act to Regulate Commerce. *Obviously, they cannot rely upon this provision of the law, for as the matter now stands they have the use of the Kansas City terminal under the provisions of the operating contract, which fixes the compensation. That paragraph of the law referred to contemplates the acquirement of the right of use by a carrier which does not have the right.*"

OTHER SECTIONS OF THE ACT.

At page 36 of petitioners' brief it is now said that "the Commission also had the suggested power under other sections of the Interstate Commerce Act." This assertion is difficult to answer, only because we are not told what sections are meant.

There is a hint at page 36 that Sections 12 and 13 are referred to; but a glance at those sections shows that they relate to investigation and procedure, not to the exercise of regulatory powers.

They cite cases in which language descriptive of the broad powers of the Commission is used, but *in every case* the language is used with reference to *some provision of the act granting specific powers.*

Let us glance at some of these cases cited by petitioners.

In *Smith* v. *Interstate Commerce Commission,* 245 U. S. 33, the Commission, in pursuance of a resolution of the United States Senate directing the Commission to investigate and report to the senate upon certain financial relations of the Louisville & Nashville Railroad Company and other carriers, had begun an investigation and had propounded to the president of the Louis-

ville & Nashville Railroad Company certain questions which, upon advice of counsel, he declined to answer. These related to expenditures by the carrier for political and related purposes and the manner of their being charged upon the books of the carrier. This Court held that the questions must be answered, using the language quoted in petitioners' brief.

The Court pointed out the purpose of the questions to ascertain "whether the amount subscribed or expended was charged to operating or legal expenses" (l. c. 42), the "complete comprehensiveness of the language of these sections" [Sections 12, 13 and 20] (l. c. 43), and held, as to the questions, that "they are quite special, and we regard them as the learned judge of the court below regarded them, as but incident to the amount of expenditures and the manner of their charge upon the books of the company" and that "this we repeat is within the power of the Commission." (l. c. 46.)

We are at a loss to understand how a power to investigate the manner of charging expenditures upon the books and their amount, expressly conferred by sections whose language this Court says is characterized by "complete comprehensiveness," can create a power not even *mentioned* in any section of the Act.

In *Railroad Commission of Wisconsin* v. *Chicago, Burlington & Quincy R. R. Co.*, 257 U. S. 563, the Commission had ordered increases in passenger interstate fares in compliance with the mandate of Section 15 (a). The Wisconsin Commission denied a corresponding increase in intrastate fares because of the maximum fare

provision of the Wisconsin statutes. The Interstate Commerce Commission found that this constituted a discrimination against interstate passengers and ordered the intrastate fares increased. The remarks of the court about the policy of the Transportation Act had reference to the *express* powers conferred by Section 13 (3) and (4) and Section 15 (a), which were quite germane to the policy of the act as expressed by the court.

The *New England Divisions Case,* (*Akron, etc., Ry. Co.* v. *United States*), 261 U. S. 184, involved Section 15 (6), as amended, which gave the Commission power to prescribe the division of joint rates. The language of the Court regarding the purpose of the Act was with reference to this *express* power, which was directly connected with the rate-making provisions designed to accomplish the purpose referred to.

Dayton-Goose Creek Railway Company v. *United States,* 263 U. S. 456, involved the recapture clause. (Section 15 (a) (5)-(7).) The Court says, it is true, that the Transportation Act of 1920 "puts the railroad systems of the country more completely than ever under the fostering guardianship and control of the Commission" (l. c. 478), but this language obviously refers to the extent to which Congress has enlarged the powers of the Commission *by the Act*—and particularly by the *express* powers mentioned by the court in the quotation set out in petitioners' brief. It does not mean that the Commission has unlimited powers, or, in fact, any powers other than those given by the Interstate Com-

merce Act, as amended by the Transportation Act. These powers are broad enough to justify the expression of the Court without twisting that expression into a grant of still further powers.

Railroad Commission v. *Southern Pacific Company*, 264 U. S. 331, arose, not under Section 3, but under Paragraphs (18) to (20) of Section 1, relating to the extension and abandonment of facilities. The Court merely held that the railroad companies could not be required to provide a new union station and extend their main tracks thereto, unless and until the Interstate Commerce Commission should act under the paragraphs referred to and thus authorize the extension. The language quoted by petitioners had to do with Section 20 (a) giving the Commission powers with respect to the issuance of securities, and was used to illustrate the general intent of Congress in giving the Commission *express* power over extensions. The second Los Angeles case heretofore referred to (*Interstate Commerce Commission* v. *Los Angeles*, 280 U. S. 52) made it clear that even this express power was not to be stretched beyond the ordinary meaning of its language.

Colorado v. *United States*, 271 U. S. 153, arose under Paragraphs (18) to (20) of Section 1, giving the Commission power to authorize the extension or abandonment of facilities. The Commission, by its order, authorized the abandonment of a line entirely within the State of Colorado but used in interstate traffic in connection with lines extending outside the state. The language of the Court was used with reference to this *express* power.

In *Texas* v. *United States,* 292 U. S. 522, the power of the Commission was expressly derived from Section 5 of the act as amended by the Emergency Transportation Act of 1933, and this Court held that a burdensome state statute could not limit that power. The language of the Court with reference to the policy of the Act was used to illustrate the extent of this *express* power.

Transit Commission v. *United States,* 289 U. S. 121, involved the *express* power given by Paragraph (18) of Section 1. The question was whether it applied to the acquisition of trackage rights as distinguished from the acquisition of the right to operate a line to the exclusion of other companies. The Court held that Paragraph (18) covered such an arrangement. The Court said, in substance, that expenditures for the construction of new lines and expenditures for trackage rights were on the same basis, and that in each case the amount to be expended could be considered in determining whether the public interest would be served by granting the certificate. The Court says:

> "The *words employed* are broad enough to cover the Long Island operations under the trackage agreement." (l. c. 128.)

The Court did not, as suggested by petitioners, base its conclusion upon the "general purpose of the act"; but, as stated by the Court, upon "the words employed."

Florida v. *United States,* 292 U. S. 1, involved the power to remove discriminations against interstate commerce resulting from intrastate rates, under Section 13,

(3), (4). It was contended, among other things, that the findings of fact by the Commission did not support its order finding such discrimination. The language of the Court, quoted by petitioners, was used with reference to this contention, and in applying the *express* power above referred to.

In *Alabama & Vicksburg Railway Co.* v. *Jackson & Eastern Railway Co.*, 271 U. S. 244, an *express* power was sustained and applied—that given by Paragraphs (18) to (20) of Section 1. Petitioners say with reference to this case that "this court has held that the power of the Commission over the general operations of carriers is so broad that it may exist and be exercised even in the absence of a specific provision of the Act authorizing such action." (Petitioners' Brief, p. 41.) This Court held no such thing. On the contrary, the Court found specific authority over the subject in Paragraphs (18) to (20) of Section 1. This Court held that physical connections between railroads engaged in interstate commerce fell within the term "the extension of its line of railroad or the construction of a new line of railroad" as used in these paragraphs. Other provisions of the Act were referred to as indicating that this language was to be construed liberally. The Court most certainly did not hold that the Commission would have power over such physical connections in the absence of this specific grant by Congress.

Cincinnati, etc., Railway Company v. *Indianapolis Union Railway Company*, 36 F. (2d) 323, did not involve

the Interstate Commerce Act at all. The court exercised a long-settled equity jurisdiction with reference to the adoption or rejection of contracts by purchasing companies, and used the language quoted *arguendo,* along with other arguments, to support its decision permitting the purchasing company to rescind a previous election and file a new one.

None of the decisions of this Court cited by petitioners furnish any support whatever for their argument that the Commission is authorized to set aside this contract because of some alleged vague purpose of the act to remove burdens from carriers. Congress did intend to give the carriers some relief and gave the Commission certain powers to that end. To the extent of those powers the Commission is authorized to grant relief, but no further. Congress did not, by granting those powers, intend to give the Commission blanket authority to give relief *outside* of those powers. Certainly, there is not the slightest justification for asserting that Congress intended to give the Commission authority to set aside at will contracts previously entered into, and under which extensive investments have been made, any more than it intended to give authority to set aside deeds of conveyance previously paid for and received—merely because the Commission might think that the railroad company had incurred too heavy an obligation under the contract, or paid too much for the land.

The general language in the *New England Divisions Case* and the *Dayton-Goose Creek Railway Company Case* has been definitely characterized and limited by this Court

in *Interstate Commerce Commission* v. *Oregon-Washington Railroad Company,* 288 U. S. 14, and what the Court says about these cases, slightly paraphrased, applies equally to the other cases cited by the petitioners and above referred to. We quote from the opinion of the Court at page 41:

> "The statements in *New England Divisions Case,* 261 U. S. 184, and *Dayton-Goose Creek Ry.* v. *United States,* 263 U. S. 456, in respect of the purposes of the Transportation Act, on which appellants rely, must be read, having in mind the situations there presented and the nature of the orders approved. Care was taken in those cases to demonstrate that the sections upheld did not, in application, go beyond the regulation of rates and the disposition of the excess over a fair return collected by a carrier, and it was shown that no taking or confiscation of property resulted. Those decisions are far from sustaining the validity of an order which seeks to require the investment of millions of dollars in a new venture in undeveloped areas."

It is evident that counsel are, by their argument on this point, reviving the suggestion made by them before the Commission, but up to now abandoned in this mandamus case, that the Commission can derive powers from some vague pervasive spirit of the act, without any language in the act appropriate to create such powers. Before the Commission they tied their kite to Section 15 (a) and "other law" and let it take them where it might. We quote from the brief of petitioner, Chicago Great Western Railroad Company, filed before the Commission on exceptions to the examiner's report:

> *"We do not maintain that there is any provision of the Act to Regulate Commerce, as now enacted, specifically conferring upon this Commission power to require a readjustment of payments made by carriers under operating contracts such as are here involved,* although it is said in the Recapture Case, *supra,* that this Commission has supervision of the joint use of terminals. The law, however, does require this Commission to fix such rates by groups as will give a fair return to the carriers operating therein; and does provide that only those carriers efficiently and economically operated shall be entitled to the benefits of the law; and does require this Commission to take such steps as may be necessary to provide and maintain an adequate railway service for the people of the country."

Petitioners argue that no rewriting of the Operating Agreement is desired, that they merely want to have one provision of the Operating Agreement changed—the amount payable by the respective companies on account of interest and taxes. Of course, this in itself is a revision—whether or not there is a physical rewriting. If the amount payable by the petitioners were reduced, then the Terminal Company would either be without funds to meet its interest and taxes or the amounts payable by other proprietary companies would have to be increased. We are immediately met with the question, by what authority can the Commission order a company to pay more for the use of physical property than it has contracted to pay? But passing that question, if the Commission should so order, is not the effect a revision of the agreement? But that is not all. Assuming, for the sake of the argument, that a change were made in this provision, based upon a find-

ing of equity, would it not be necessary, in order that equity might really be done, that other changes be made to conform the relations of the parties to their new status in respect to interest and taxes? Might it not be necessary to alter the provisions for care of equipment, etc., so as to give those who were carrying the burden of the capital charges some profit on the transaction? Might not the same thing be required in in regard to the provisions covering expenses of operation and maintenance?

The justice of apportioning expenses of operation and maintenance on a car mileage basis is only approximate. A large part of the expense of maintenance is required regardless of use. Ties will rot, roadbeds deteriorate, appurtenances become obsolete, whether the tracks are used or not. Consequently, a part of such expenses might well be apportioned equally among all the owners. The provision for division of interest and taxes in a measure adjusts this discrepancy. If one factor, however, were disturbed, would it not require an entire reconsideration of the other? In other words, would it not be necessary to readjust the whole contract so as to make an equitable whole rather than to slash into one provision of the contract, leaving the rest of the contract somewhat inappropriate for these changed conditions?

The cases of *L. & W. R. Co.* v. *Mottley*, 219 U. S. 467, *New York* v. *United States*, 257 U. S. 591, and other cases cited on pages 49 and 50 of petitioners' brief, have no application in this case. While, in some instances, contracts which undertake to control matters within the

regulatory powers of Congress will not prevent the exercise of the paramount power of Congress, there are always two elements in such cases. *First,* the field is always clearly one within the police powers of Congress, and *Second,* Congress has unmistakably evinced its intention to exercise its power over the particular subject matter. In no case has this Court held that a valid contract can be superseded by the action of an administrative body, not authorized by any specific provision of any act of Congress, but sought to be justified by a supposed plenary control over the parties involved—an extent of destructive control which Congress itself has never undertaken to exercise over private property.

THE COURT OF APPEALS OPINION.

While the Court of Appeals held that mandamus would not lie against the Commission, whether the Commission's construction of the act was right or wrong, it is evident from the opinion, and the court in effect declared, that the Commission did not have the powers asserted by the petitioners. The court said (71 F. (2d) l. c. 340, R. 254):

> "And we may remark in passing that, to justify the Commission in the exercise of such authority as is asked, the right to do so should be expressed in clear and certain language. • • • but it is going too far to say that all or any of these powers of themselves justify the abrogation or annulment of a valid contract between carriers in the use of terminal facilities because in its subsequent carrying out inequalities are shown to exist."

ACT SHOULD NOT BE SO CONSTRUED AS TO RAISE GRAVE CONSTITUTIONAL QUESTIONS.

Even if there were ambiguity in the language, there would be no difficulty in reaching its proper interpretation. To interpret it as petitioners advocate would at once raise grave constitutional questions.

We expect to show later that they would be insuperable. It is enough here that they are serious. It is a thoroughly settled principle of statutory construction that an interpretation which would render a statute unconstitutional or of doubtful constitutionality will never be adopted if any other interpretation is permissible. (*United States* v. *Delaware & Hudson Company,* 213 U. S. 366, 407; *State of Texas* v. *Eastern Texas R. R. Co.,* 258 U. S. 204, 217.)

> "Acts of Congress are to be construed, if possible, in such a way as to avoid grave doubts of this kind." (*Lewellyn* v. *Frick,* 268 U. S. 238, 251.)
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> "We do not discuss the question whether it [Congress] could do so if it tried, as nothing short of the most explicit language would induce us to attribute to Congress that intent." (*Federal Trade Commission* v. *American Tobacco Company,* 264 U. S. 298, 306.)

If Congress had intended to confer upon the Commission the right to destroy contract relationships between railroad companies, upon which their rights of property are established, and upon the faith of which money for the construction of facilities has been borrowed from trusting investors, Congress would have so provided. It would not have left any such extraordi-

nary power to be inferred from language authorizing the condemnation of trackage rights generally, nor from general language directed against discrimination by carriers.

In *Interstate Commerce Commission* v. *Oregon-Washington Railroad Company*, 288 U. S. 14, the Court says (l. c. 40, 41):

> "There is another consideration which supports the construction adopted. Our duty is to construe the statute, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score. The views advanced by the appellants, to say the least, raise serious questions in this respect. The railroads, though dedicated to a public use, remain the private property of their owners, and their assets may not be taken without just compensation. The Transportation Act has not abolished this proprietorship. * * * The decisions of this court will be searched in vain for the announcement of any principle of Constitutional interpretation which would support the order of the Commission."

PETITIONERS' CONSTRUCTION RENDERS ACT IN VIOLATION OF FIFTH AMENDMENT.

The construction put upon the Act by petitioners makes the Act unconstitutional. It plainly amounts to a deprivation of the property of this respondent, of the other proprietary companies, and of the holders of the bonds sold by the Terminal Company. Not only does it result in the destruction of the Operating Agreement, it also disrupts and destroys the property rights vested in the proprietary companies and in the Terminal Company by reason of the valuable properties surrendered by some

of the companies, the equitable interest in the property of the Terminal Company obtained by all, and the vast investments made by the Terminal Company on the faith of the contracts entered into.

> "* * * *The powers possessed by the commission are delegated by Congress under, and are to be exercised in conformity with,* the constitutional grant of authority to regulate interstate and foreign commerce." (*United States* v. *Chicago, Milwaukee, St. Paul and Pacific Railroad Company,* 282 U. S. 311, l. c. 324.)
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> "* * * We need scarcely repeat what this court has more than once said, that the power to regulate interstate commerce, great and paramount as that power is, cannot be exerted in violation of any fundamental right secured by other provisions of the Constitution. *Gibbons* v. *Ogden,* 9 Wheat. 1, 196; *Lottery Case,* 188 U. S. 321, 353." (*Adair* v. *United States,* 208 U. S. 161, l. c. 180.)

OPERATING AGREEMENT IS PROPERTY.

(a) The Operating Agreement is a contract which establishes valuable proprietary rights as between the parties to it, and unquestionably is property. (*Adkins* v. *Children's Hospital,* 261 U. S. 525, 545; *Coppage* v. *Kansas,* 236 U. S. 1; *Allgeyer* v. *Louisiana,* 165 U. S. 578; *Missouri-Kansas-Texas R. R. Co.* v. *Oklahoma,* 271 U. S. 303; *United States* v. *Chicago, etc., Railroad Company,* 282 U. S. 311, 327; *Green* v. *Edwards,* 31 R. I. 1, 77 Atl. 188; *People* v. *Kempner,* 139 N. Y. S. 440 (affirmed 208 N. Y. 16, 101 N. E. 794); *Western Massachusetts Co.* v. *Hilton,* 58 N. Y. S. 996.)

Of course, it is possible that Congress might authorize the taking of contract rights as well as phys-

ical property for public use, but in such event, the Fifth Amendment would require that just compensation should be ascertained and paid for the destruction of the contract rights. (See *Offield* v. *New York, etc., Co.*, 203 U. S. 372; *Monongahela Navigation Company* v. *United States*, 148 U. S. 312; *Adair* v. *United States*, 208 U. S. 161; *United States* v. *Chicago, etc., Railroad Company*, 282 U. S. 311.)

The parties to the Operating Agreement would, therefore, be entitled to compensation for the acquisition or destruction of their property rights.

They would also be entitled to compensation for the destruction of vested rights of those roads which transferred properties to the Terminal Company for the common enterprise.

The Act, however, contains no provision for condemning contract or other rights nor providing compensation therefor, and appellants, by their interpretation of the Act, deny that the Act contemplates their condemnation or the payment of compensation for them.

BONDHOLDERS ENTITLED TO DUE PROCESS OF LAW.

(b) The trustee in the Terminal Company's First Mortgage is a party to the Operating Agreement, and the Operating Agreement has been assigned to and pledged with the trustee by all of the parties to the Operating Agreement as security for the first mortgage bonds of the Terminal Company. (R. 16, 39, 91.) The contract rights of the bondholders are vested rights, and the cases above cited under the preceding point apply equally here.

In addition, neither the trustee in the mortgage nor the bondholders were parties to the proceeding before the Interstate Commerce Commission and could not be made parties since the Interstate Commerce Act gives the Commission jurisdiction only over carriers. It does not give the Commission jurisdiction over the private rights of individuals, banks and other corporations.

The first principle of due process of law is notice and an opportunity to be heard. (*Davidson* v. *New Orleans*, 96 U. S. 97; *Hager* v. *Reclamation District*, 111 U. S. 701, 708; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413.)

In *Coe* v. *Armour Fertilizer Works, supra*, the court says, with reference to the Fourteenth Amendment:

> "which requires at least a hearing or an opportunity to be heard in order to warrant the taking of one's property. (l. c. 423.)
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> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the constitution requires. (l. c. 424.)
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> " 'This notice must be provided as an essential part of the statutory provision and not awarded as a mere matter of favor or grace.' " (l. c. 425.)

Due process of law in the Fifth Amendment has the same meaning as in the Fourteenth Amendment. (*Twining* v. *New Jersey*, 211 U. S. 78, 101.)

Even if the trustee and the bondholders had had notice, their interest in the mortgage is property, which

is protected by the due process clause and cannot be taken without just compensation. "It is fundamental that a mortgage or trust deed securing an indebtedness is 'property' within the meaning of the Constitution of the United States." (*Illinois Trust & Savings Bank* v. *City of Des Moines*, 224 Fed. 620, 621.)

See, also, *Bradley* v. *Lightcap*, 195 U. S. 1.

Petitioners' argument (page 56 of their Brief) that it makes no difference to the bondholders whether the Operating Agreement is maintained or not, is palpably fallacious. The bondholders are entitled to the full benefit of the covenant of *every party* to the Operating Agreement that it will pay its part of the principal and interest of the bonds, *promptly when due* (*i. e.* ten days before the Terminal Company must pay the interest on the bonds), and all of it ultimately, even if every other party should be insolvent or out of existence. (See Article II, Section I of the Operating Agreement, especially Paragraphs (a), (b) and (f) (R. 20, 21).) They are entitled to hold the Kansas City Southern and the Chicago Great Western, which are solvent companies, for the full amount of their proportionate part of principal and interest (R. 21), and their proportionate part, or the whole, of any amount which may be payable on account of the default of any other company. (R. 21.) They cannot be forced to wait and see what amount the Terminal Company may happen to collect from other companies pursuant to some order of the Commission. They are entitled to the full benefit of the covenants of the parties which made them.

THE BACKGROUND OF THE RECORD.

Mr. Justice Holmes, while chief justice of the Supreme Judicial Court of Massachusetts, said with reference to certain objections raised to the condemnation of lands for the South Station in Boston:

> "The truth is that the supposed objections are of so shadowy a form and consist so largely of rhetorical expressions, that it is hard to grapple with them, and yet that they derive a kind of life from the atmosphere of the cases." (*Sears* v. *Board of Street Commissioners,* 180 Mass. 274, 62 N. E. 397, l. c. 400.)

The petitioners have created a similar atmosphere. The atmosphere of the case here is the assumption, reiterated in various forms, that the Operating Agreement is grossly inequitable and the repeated use of expressions by this Court, detached from their context, with reference to the broad powers possessed by the Interstate Commerce Commission. It was undoubtedly this atmosphere of the case which led the Court of Appeals of the District of Columbia to indulge in the *obiter dicta* quoted at page 46 of the petitioners' brief. There is no basis in the Interstate Commerce Commission's report for the conclusion expressed in these *obiter dicta.* They are based on the assertions of counsel, the figures set up in an exhibit, the conclusions drawn from which were not admitted, and, perhaps, on the remarks contained in the dissenting opinion of Commissioner Eastman, which itself consisted largely of conclusions and which, so far as it undertook to state facts, did not state them fairly.

We have felt that the fairness or unfairness of the Operating Agreement is not properly an issue in this, a mandamus case, and, consequently, have avoided discussing it in our briefs. Since, however, the Court of Appeals has apparently been misled by petitioners' assumptions and conclusions and by our silence, and since petitioners in their brief (Summary of Argument, 2 (d), page 13) state that the "undisputed facts" show that the division of payments constitutes prejudice and discrimination (see also page 47 of their Brief), it seems desirable, if not necessary, that we discuss the subject briefly. We shall endeavor not to make it a controversial issue, but to discuss it far enough to show this Court that there is no basis for the assumption, so artfully insinuated by the petitioners and apparently accepted by the Court of Appeals without analysis, that there is only one side to the question and that the equities are necessarily with the petitioners.

Where necessary, we may occasionally refer to undisputed facts not clearly set forth in the Commission's report, but contained in the record before the Commission. In the main, however, the facts are clearly set out in the Commission's report.

As a basis for their conclusions, the petitioners argue that the payments made by the proprietary companies on account of interest and taxes, payable by the Terminal Company, are merely payments for the use of facilities and, consequently, that a company, which, at the time, happens to use the facilities less than another company, should pay a less amount.

This argument purposely ignores the whole history of the enterprise and the actual relations of the parties —though these are well known and are set out in the report of the Commission. (R. 75-89.) The proprietary roads did not come to the Terminal Company, an owner of a system of terminal facilities, and bargain for the use of the desired portions. They, themselves, organized the Terminal Company. (R. 76.) Their officers were the directors of the Terminal Company. (R. 89.) They laid out the plans under which its facilities were constructed and designated the properties to be acquired by it. While the petitioners were not in the first negotiations, they became parties to the contract very soon after the original execution of the contract and before the construction work was done. The plans for the facilities were not actually attached to the Operating Agreement at the time of its execution. They were not completed until long afterwards and the petitioners had their voice in their formation, just as did the other proprietary companies. (R. 77, 89.)

Neither of the petitioners was obliged to become a party to the agreement. They occupied together a passenger station which, so far as the record shows, satisfied their needs. (R. 76.) The Kansas City Southern peremptorily and persistently demanded that it be permitted to become a party. (R. 89.) To have refused it admission on the same terms as the other proprietary companies would have subjected the Terminal Company and the other proprietary companies to possible violation of the anti-trust laws. (*United States* v. *Terminal Railroad Association of St. Louis*, 224 U. S. 383.) After

the Kansas City Southern had demanded the right to admission, the Chicago Great Western (which, at the time, occupied with the Kansas City Southern the Kansas City Southern passenger station (R. 76)) was invited to become a party and did so. (R. 89.)

The project, as clearly shown by the record, was of necessity a matter of compromise among the conflicting interests of the carriers. This was largely because the carriers respectively had settled locations for their entrance to the city and yards and other facilities. What was advantageous for one carrier in the construction of the terminals might be less advantageous for another carrier, and *vice versa*. This is illustrated by the matter of the location of the Union Station. The original station site in the west bottoms was greatly preferred by the Burlington and some other carriers because it lay immediately at their entrance to the city. (R. 82A.) It was convenient to their yards, and naturally their operating expenses would be lessened by its use. The same thing was true of the north end site as to other carriers and of the site finally selected as to still other carriers. (R. 89.) Similar considerations obtained with respect to other facilities. The so-called High Line, an elevated line leading from a point west of the Station across the Kaw River and through Kansas City, Kansas (R. 79), one branch being used by the Chicago Great Western and the Missouri Pacific and the other branch by the Rock Island and the Union Pacific, was of direct and paramount utility to the carriers which would use it. It was of no direct utility to the other carriers, but it was of decided in-

direct advantage to many of them, in that it removed a large amount of traffic from surface tracks which would otherwise be burdened by it and eliminated many crossing delays which would necessarily result from giving preference to the passenger traffic of the four roads named. The so-called West Bluffs Line (R. 80) was of direct advantage to the Burlington, Wabash and Rock Island, the roads using the so-called Hannibal Bridge (R. 80), because it gave them speedy and uninterrupted passenger entrance into the Union Station. Like the High Line, its benefit to the other roads was the indirect benefit of removing this passenger traffic from the surface lines. On the other hand, it might be said that the necessity of having this line was a disadvantage to these three roads because their operating expenses were undoubtedly increased over what they would have been had the station been located at the old site, since, under the provisions of the Operating Agreement apportioning operating expenses on the basis of the car mileage in the particular zone, these three roads, as the sole users of this zone, are obliged to pay all of the operating expenses. Conversely, if the Station had been located in the north end or at the old union station site, the roads which enter the city from the south, such as the M-K-T and the Frisco, would have been obliged to increase their operating expenses by using this or a similar line to reach the other locations. (R. 89.) In a similar way, the location of the Station on the south side required the roads which enter the city from the east to use about six and one-half miles of track along the line of the

old Kansas City Belt Railway which, on account of the contour of the country and the cost of real estate, was an expensive line. The operating expenses of these roads were thereby greatly increased. Again, the North End Freight Line was of marked importance to the Chicago and Alton. On account of the failure to complete certain tracks around the goose neck to connect with tracks leading to the west (R. 90), the chief use of this line is by the Alton. (R. 79.) The result, of course, is that most of the operating expenses of this line fall upon the Alton. The coach and engine yards for the care, repair and cleaning of locomotives and coaches were greatly desired by some of the roads but others use them little or not at all. (R. 79.) Freight stations were constructed at strategic points, at which freight is received and delivered for all of the roads. (R. 80.) Other illustrations might be given, but these will suffice to show that the project was in every sense a joint project (R. 80) and that the Terminal Company was merely the corporate instrumentality for effecting what was in substance an undivided ownership of the facilities. The Terminal Company was in effect a trustee holding legal title to the property, but with the equitable title as well as the ultimate control of finances and operations in the proprietary companies. (Cf. *Chicago, Milwaukee & St. Paul Railroad Company* v. *Des Moines, etc., Railway Company*, 254 U. S. 196.) Each of the roads reserved to itself, through the Operating Agreement (R. 77) and through the franchise ordinance granted by the City of Kansas City (R. 76, 83, 84), the absolute and un-

restricted (subject only to the reasonable regulations of the Terminal Company) right to use each and every part of the terminal facilities, except industry tracks, team tracks, etc. No road had any preference over any other road in this respect. Their right of use was not only absolute and complete, but it was joint and equal. (R. 17, 18, 80, 186.)

In order to preserve and guarantee the perpetuity of this joint and equal ownership and control, the roads joined in the organization of the Terminal Company, each of the roads subscribing for an equal part of the capital stock. (R. 76.) This capital stock, except for qualifying shares for directors, was transferred to a trust company as trustee under a Stock Trust Agreement, by which the roads were entitled to receive from the trustee all dividends which might be declared upon the stock, and, so long as it was not in default under the Operating Agreement, to receive proxies executed by the trustee, entitling the railway company to vote the stock. (R. 77, 122, 125.) It was also provided that, in case any railroad company should default in its obligations under the Operating Agreement, the stock deposited by it should be held by the trustee for the use and benefit of the nondefaulting companies. (R. 125.) It was provided in the Operating Agreement that each road should agree to pay into the treasury of the Terminal Company, ten days before any interest or taxes on the first mortgage bonds of the Terminal Company might be due, each one-twelfth of the amount so payable for interest or taxes, and, in case of default by any company, its proportionate part of the amount so in default.

(R. 20, 21.) Since each of the proprietary companies, as a virtual joint owner, had the right under the Operating Agreement to run its trains over each and every part of the facilities at its election, but obviously might not at any particular time elect to do so, it was provided in the Operating Agreement (R. 25) that each road should pay its proportionate part of the operating and maintenance expenses of the part so used by it. In order to permit the necessary accounting and the proper apportionment of expense, the property was divided into various zones, the limits of each zone as a rule marking the limits of a given common use of a certain section of the property —not designating an independent facility. (R. 78, 82A.) The boundaries of the zones were to be fixed by the board of directors representing all of the roads. (R. 25.) The Operating Agreement provided that the expenses of the Union Station zone should be apportioned on the basis of the number of cars and engines entering said zone. (R. 25.) The expenses of most of the trackage zones were apportioned on the basis of car mileage, and the expenses of other zones on various different bases. (R. 26.)

It is obvious that these different bases of distribution are necessarily somewhat arbitrary and may in themselves call for a certain amount of compromise as between the various roads. For example, a short train in the Union Station may occupy a given track for as long a time as a longer train. Consequently, a train of twelve cars probably does not use the station fifty per cent more than a train of eight cars and yet, it would pay fifty per cent more towards operating expenses. A

through train entering the station and leaving the station a few mintues later does not actually use the station twice as much as the same kind of train having its origin or destination in Kansas City, yet it prays twice as much. (R. 26.)

In another respect the agreement had to be the result of compromise. Certain roads had facilities which were needed as a part of the whole terminal project. The Kansas City Belt Railway was the backbone of the main line to be established on the south side. It was owned by three of the roads. As a part of the project, it was transferred for the benefit of all of the roads at book value—much less than the value claimed for it. (R. 89.) Unless it had been so transferred, it would have been virtually impossible to have located the station where it was located, as the Belt Railway occupied practically the only available route from the Union Station to the easterly part of the city. It was possible to widen this right of way, but it would have been difficult, without vastly enhanced expense, to acquire an entire independent right of way of sufficient width. Some of the necessary lands for the construction of facilities in the west bottoms, for the construction of the so-called High Line, for the construction of the West Bluffs Line, for the construction of the north end tracks and other facilities, were acquired from the proprietary companies. In some cases they gave up property and facilities which would have been vitally needed by them if the Terminal Company had not supplied their needs.

Again, we must not look at the terminal facilities as if we had merely the question of a union passenger

station. The Terminal is what might be called a unified terminal, almost completely integrated. (R. 78, 82A.) There is probably not another terminal in the United States exactly comparable to it in this respect, at least not another one where every railroad entering the city has the right of access for its trains to every part of the Terminal, without the payment of any charge therefor. Not only is there the Union Station with trackage leading some six and one-half miles to the east and several miles to the west along the High Line, and with connections also both on the north and on the south to bring in the railroads entering the city from those directions (R. 78, 82A), there is also a freight line along the north side of Kansas City, also about six and one-half miles in length (R. 79); a double track freight line through the heart of the network of railroad tracks in the west bottoms of Kansas City (R. 97); an industrial line leading across the Kaw River into Kansas City, Kansas (R. 79), and touching most of the packing houses and large industries; two passenger stations along the High Line in Kansas City, Kansas, for the joint use of the railroads using the High Line (R. 80), freight stations at various points in the city for the joint use of all the roads (R. 80); yards for the assembling and breaking up of cars in order to facilitate interchange (R. 80); connections with every railroad entering the city and switching facilities for the handling of interchange movements between the various roads (R. 80); a system of industry tracks serving a very large number of industries in the city (R. 80); a double track bridge across the Kaw River into Kansas (R. 79); and

numerous other facilities, providing for the railroads facilities which would be of enormous cost to them if they had to supply them themselves.

If the roads had had to supply these various facilities each for itself, each would have determined for itself what the facilities were worth to it and whether it would construct them. It would not have measured such worth by what some other railroad might be expending for its terminal facilities. If some other railroad could get along for a much less figure, very well, that was its business. If some third railroad, on account of anticipation of future needs, desired to expend a much larger sum of money, very well, that was its business.

So, in planning the terminal project which the twelve roads themselves controlled through their representatives on the board of directors, the question to determine was whether the proportionate expenditure which each road would incur was a proper capital expenditure for that road to make.

Since the total cost of the Terminal as of the date of the hearing was approximately $48,000,000 (R. 88, 89), the proportionate capital investment to each road (if the roads had put up the money instead of borrowing most of it) would have been approximately $4,000,000. It is difficult to see how any road could have provided independent freight and passenger facilities, furnishing anything like the conveniences which the Terminal Company furnished, in a growing city of the population and activity of Kansas City, at a figure as low as this; but, whether it could or not, it was certainly a question for the board of directors of each company to determine

whether or not it desired to make such an investment in joint facilities. The situation was no different than it would have been if each road had determined to construct its own terminal facilities independently of all other roads. The fact that the Terminal Company was created as a corporate instrumentality to construct and hold title to the facilities, and to act as an instrumentality for insuring fairness and impartiality among the various equitable owners, does not materially change the substance of the situation.

Let us suppose that, at the time of organizing the Terminal Company, the railroads, instead of providing for the issuance of bonds, had each paid in four million dollars, and had thus acquired and retained an undivided one-twelfth interest in the terminals constructed. Would anybody argue that there is any provision of the Interstate Commerce Act which would authorize the Commission to compel some of the carriers to refund to the other carriers a part of their respective investments? Obviously, the situation would be no different if the carriers, instead of acquiring undivided interests, had caused the Terminal Company to be organized, and had taken aliquot parts of its capital stock in return for their respective four million dollar payments.

Such a transaction is in substance the same as the transaction which actually took place. The only difference is that the railroads, not having sufficient cash available to pay in, paid for their interests, partly in cash and partly by executing a contract, which is, in practical effect, very much the same as a joint and

several guaranty of the bonds issued to raise the rest of the money needed. The fact that part of the consideration was paid in cash and part in installments cannot change the nature of the transaction. The transaction is the same in essence as the acquisition of a right of way and the construction of a railroad by a single railroad company. The fact that, in this case, the acquisition was by the railroads as tenants in common does not change its character. If a single railroad acquired a right of way and agreed to pay for it partly in cash and partly in installments, such an agreement, absent default on its part, would give it just as substantial rights as would a contract fully executed by the cash and conveyance method. The fact that in this case the various tenant lines *joined* in agreeing to pay for the right of way and improvements does not alter the nature of the transaction.

Furthermore, it should be noted that, even where the Interstate Commerce Act gives the Interstate Commerce Commission express power to control the actions of carriers, it does not undertake to disturb underlying vested proprietary interests. For example, suppose a railroad company buys land for shops, either for cash or on installments, uses the shops a while and then abandons them with the authority of the Commission. (Cf. *State of Texas* v. *United States,* 292 U. S. 522.) Plainly it could not, on that account, with or without the authority of the Commission, repudiate the contract which it had made with the private property owner for the acquisition of the land, either by rescission of an executed contract or by repudiation of an executory one—

even though the expenditure for the useless land may remain a burden.

It may be that, at the present time, some of the roads use the facilities less than others. At the same time, Exhibit No. 2, attached to the petitioners' petition for mandamus (R. 60), does not fairly reflect either the differences or the result. This respondent's answer challenged the accuracy of the conclusions to be drawn from this exhibit and the basis upon which it was made (R. 185-187), and they, therefore, cannot be taken as admitted, as petitioners seem to assume. In the first place, there is no comon denominator by which the use of various zones can be accurately measured, one being on a car basis, some on a car mileage basis, and others on various different bases. Various efforts at rough approximations to secure averages could be made which would lead to different results. (R. 87.) The one used by petitioners happens to be merely a proportionate part of all operating expenses paid, measured in money—obviously not a scientifically accurate basis. Again, if the total payments made by the various proprietary companies, instead of merely the payments of interests and taxes, were taken into account, it would immediately be seen that the small users are not in the aggregate paying anything like the same amounts as the larger roads. For example, in 1932, the Kansas City Southern and the Chicago Great Western each paid less than $240,000 in the aggregate, including taxes and interest and joint operating expenses, and after deduction of net earnings of the Terminal Company distributed to the proprietary companies, while the Missouri Pacific and the Chicago, Rock Island & Pacific

paid approximately $500,000, and the Santa Fe approximately $670,000.

Again, while it may be true, as above stated, that some roads may now be making less use of the property than others, it does not follow that this will always be the case. In particular zones the record showed very wide fluctuations in the use made from time to time. Expansion and contraction of facilities, territory and trains may result in vast changes in the use. Each road has provided for its use facilities deemed adequate for its needs, facilities which it can command at any time when it wants them. Many of them it now uses, all of them it may use, and there is certainly no inequity in its paying for what it has provided for itself. It must be borne in mind that, as an undivided owner commanding an unlimited right to use the facilities, it is securing everything at cost, which an outsider could not do. Clearly, if the Terminal Company were in the position of an independent owner of this property, it would be absurd for it to agree to let the proprietary roads use the property on the terms provided in the Operating Agreement, that is, at actual cost to the Terminal Company. It would mean that the Terminal Company would have no source of profit and no return on its investment except such revenue as it might get from concessions in the station, switching revenues, etc. On the major part of its investment, it would be getting no return whatsoever. Plainly, if the parties were dealing at arm's length, and if the proprietary roads were not the joint owners of the enterprise, the Terminal Company would be entitled to

compensation for the use of its property commensurate with the investment. To this end it would either add to the various joint operating expenses paid by the roads a substantial sum for profit, or it would make each road a substantial standby charge for the right to use, and it would undoubtedly add an item for profit on the various services and repairs extended to the roads in the coach and engine yards. On the other hand, if its return were not arranged in this way, it would be entitled to charge a rental on the principles of eminent domain. This, as indicated in the report of the Commission in the M-K-T case, would necessarily result in requiring each road to pay an equal amount for what it acquires, that is, the joint and equal right to use the facilities. It could not require the Terminal Company to hold each and every part of its facilities ready for the use of such company whenever it chose to use it and then not pay anything unless at some particular time it happened to want to use it. As the Commission says:

> "Petitioner contends that the numerical basis is grossly inequitable, and that there is nothing in the language of the statute or the decisions of this Commission or the courts which prevents measuring the compensation by the extent of the use. *When analyzed, its position amounts to this, that respondent must hold its property in readiness at all times for the joint and equal use of petitioner, but that petitioner should be permitted to use the various zones if and when it may choose to do so, or not at all if it should so choose as to any particular zone, and to pay only for such use as it may actually make of the property.*
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> *The user basis* as a method for determining the portion of the interest charge to be imposed upon petitioner finds no support in the principles governing compensation in condemnation cases, *and in our opinion does not afford a just and reasonable basis.* We conclude that the numerical basis in the circumstances of this case affords the just and reasonable method to be applied." (Italics ours.) (*Missouri-Kansas-Texas Railroad Company* v. *Kansas City Terminal Railway Company,* 198 I. C. C. 4, 9, 11.)

The Commission also points out that, wherever the courts have had occasion to determine what a stranger should pay for the use of facilities, they have never adopted the so-called user basis. The Commission says:

> "We have been directed to no reported case in which it has been necessary for a court to determine the compensation to be paid for the joint and equal use by one company of another's facilities, where the court has not divided the return on the fair value of the property equally among the users, except the first report in *Oregon-Washington R. & Nav. Co.* v. *Spokane, P. & S. Ry. Co.,* 83 Oreg. 528, hereinafter *called the Portland Bridge case,* and there the departure from the ordinary rule was because the new company which came in acquired the right to use the property only for freight purposes whereas the carriers already occupying the property used it for both freight and passenger purposes." (*Missouri-Kansas-Texas Railroad Company* v. *Kansas City Terminal Railway Company,* 198 I. C. C. 4, 9.)

Among the cases supporting this statement of the Commission, we may mention the opinion of Mr. Justice Brewer, then circuit judge, in *Central Trust Company* v. *Wabash Railway Company,* 29 Fed. 546, 559, affirmed in

Joy v. *St. Louis*, 138 U. S. 1, and afterwards approved and interpreted in *St. Louis, etc., Railroad Company* v. *Wabash Railroad Company*, 217 U. S. 247; *Grand Avenue Railway Company* v. *People's Railway Company*, 132 Mo. 34; *Grand Avenue Railway Company* v. *Lindell*, 148 Mo. 637; *Grand Avenue Railway* v. *Citizens Railway Company*, 148 Mo. 665; *Toledo Consolidated Street Railway Company* v. *Toledo Electric Street Railway Company et al.*, 6 Ohio C. C. 362; *Oregon-Washington Company* v. *Spokane Company*, 163 Pac. 600, 603 (Oregon). See, also, *New York Central Railroad Company* v. *Central New England Railway Company*, 162 N. E. 324 (affirmed in *Central New England Railway Company* v. *Boston & Albany Railway Company*, 279 U. S. 415).

> "Under those circumstances it seems to me no more than fair that a new company which crowds itself into an equal access to such benefits and such privileges pay an equal share of the interest on the value of the property." (Brewer, C. J., in *Central Trust Company* v. *Wabash*, 29 Fed. 546, l. c. 559.)
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> "In order to the enjoyment of these rights and privileges (that is, the equal rights and privileges relative to the passage of railroad trains and cars over the bridge), it is not necessary that defendant should transport thereover the same number or the same kind of trains and cars as plaintiff." (*Oregon-Washington Company* v. *Spokane Company*, 163 Pac. 600, l. c. 603.)
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> "'The probability that the appropriator will not exercise, or the fact that there is no present intention of exercising, to the full extent the rights acquired should not be considered in reduction of the damages, where there is nothing to prevent a full

exercise of such rights, since the presumption is that the appropriator will exercise his rights and use and enjoy the property taken to the full extent.'" (*Shell Pipe Line Company* v. *Woolfolk*, 331 Mo. 410, 414.)

We might here say a word about the basis of Commissioner Eastman's dissenting opinion, upon which counsel for petitioners appear to rely, and which the Court of Appeals must have treated as the foundation for the *obiter dicta* of that court. We do not refer to his conclusions of law, which are refuted elsewhere in this brief, but to his statements and conclusions of fact. He, like the petitioners, assumes an inequity, ignoring entirely the basis upon which the contract was made. He also mistakenly assumes that the so-called user basis is well-nigh universal in terminal contracts. The instances to which he refers were many of them shown in the record not to be comparable. As to others, the respondents did not have information.

Commissioner Eastman completely ignored the evidence in the case which showed that the unit or numerical basis was almost universal in the southwest and to a large extent in the middle west. For example, a few of the stations where the unit basis or a stock ownership basis obtained, as shown by the record, were Dallas, Texas; Galveston, Texas; Union Station, Chicago; Dearborn Station, Chicago; Joplin, Missouri; Joliet, Illinois; St. Joseph, Missouri; Atchison, Kansas; Wichita, Kansas; Pueblo, Colorado; Denver, Colorado; El Paso, Texas; and Houston, Texas.

We trust that what we have said is sufficient to remove from anyone's mind the idea that there is some in-

justice here crying aloud to Heaven and demanding a remedy at the expense of settled principles of statutory construction. As previously indicated, we do not feel that the question of the equity or inequity of the contract can be considered in a petition for mandamus, but we could not let the repeated artful allusions to this alleged inequity pass without comment.

There is one other practical consideration which should be referred to in this connection. While there has been considerable controversy among the carriers over the terms of the contract, these controversies are now virtually ready for final settlement and disposition were it not for the instant case. The Commission, after an extended hearing covering values, uses and all other pertinent facts, has determined the fair compensation to be paid by the M-K-T and has repudiated the very basis which furnished the excuse for these petitioners coming into the M-K-T case. The M-K-T has decided that it would be to its advantage to become a proprietary company with all of the rights, privileges and joint control which the proprietary companies have, rather than, as a tenant, to pay a fair return on the particular facilities which it has chosen to use—the report of the Commission finding that this fair compensation was a sum in excess of what the M-K-T would pay as a proprietary company. The other roads which had potential controversies are likewise ready to end them, leaving only these petitioners (and possibly, though not certainly, the Alton Railroad Company, whose time for electing to adopt or reject executory contracts of its predecessor company has not yet expired) unsatisfied.

Should these petitioners, after having waited for more than five years following dismissal of their interventions before filing petitions for rehearing, and after waiting more than seven years before taking any action in court, be permitted to disrupt an otherwise harmonious settlement of the controversy? Are they not guilty of laches? Do not their petitions in reality raise a moot question, since the main case in which the interventions were filed has been disposed of?

II.

Petitioners Must Fail for Other Reasons.

The objection that the intervening petitions unduly broadened the issues was set up in the motions to strike (R. 74, 75), and was a sufficient ground for their dismissal by the Commission, even though the Commission did not put the dismissal on this ground. Rule II (1) 3 of the Commission is in part as follows:

> "Leave [to intervene] will not be granted except on allegations reasonably pertinent to the issues already presented and which do not unduly broaden them."

Clearly these interventions were not germane to the original case. The original case was a proceeding under Paragraph (4) of Section 3 to determine just compensation to be paid by a stranger to the property for acquiring the use of that property. The petitioners in their interventions undertook to set up a case of discrimination as between *owning carriers* under other provisions of the Interstate Commerce Act. Conceding, for the sake of argument, that the allegations were proper for

consideration in an independent proceeding filed by the petitioners, such controversies were not germane to the sole issue before the Commission in the M-K-T case, that is, whether it was in the public interest that the M-K-T should use these facilities and, if so, what was the compensation to be paid therefor by it.

Furthermore, this is a moot case, at least as to the Chicago Great Western. Since the Commission has now decided the proceeding brought by the M-K-T, and has resolved the M-K-T's main contention against it, it ought not to be obliged to take charge of collateral issues which have no relation to the main case. Such is the situation of the Kansas City Southern. As to the Chicago Great Western, the report and order of the Commission have even more clearly made its intervention moot. The relief which it prayed was expressly made contingent upon the Commission fixing the compensation to be paid by the M-K-T in an amount less than the amounts which it would be required to pay under the Operating Agreement.

Since the Commission has fixed the amount to be paid by the M-K-T at a greater instead of a less sum (*Missouri-Kansas-Texas Railroad Company* v. *Kansas City Terminal Railway Company*, 198 I. C. C. 4, 31), and since the M-K-T has signified its intention to become a party to the Operating Agreement, abiding by all of its terms and conditions, the basis for the Chicago Great Western's intervention falls. Again, should these parties be entitled to the extraordinary relief of mandamus when they have slept on their rights since 1925, almost ten years? The excuses for the delay offered by the petitioners are not sufficient. If they were serious in their contentions, they should

have proceeded with their application for mandamus promptly, so that (if the issues were really germane to the case) the Commission could have reached one decision which would dispose of the case. Are they not guilty of laches which will preclude them from relief even if they were otherwise entitled to it? See *United States ex rel. Arant* v. *Lane*, 249 U. S. 367, where the Court held laches to be applicable in a mandamus case.

III.

The Court of Appeals Correctly Decided That Mandamus Would Not Lie in Any Event.

The Court of Appeals held that the Commission, having determined, after a hearing and after construction by it of statutes, which, viewed in the light most favorable to petitioners, were not free from doubt, that it could not grant the relief prayed, was not subject to control by mandamus. (R. 200, 71 F. (2d) 341.)

This Court said in *Interstate Commerce Commission* v. *United States*, 280 U. S. 52, l. c. 71:

> "In what situations, if any, action of the Interstate Commerce Commission may be controlled or corrected by mandamus need not now be considered, because it is apparent that there is here no meritorious basis for exerting such power, even if found to exist."

It is also unnecessary to consider this question here. We discuss it, however, because it was decided by the Court of Appeals and it is stressed by petitioners.

It has been settled by this Court that, where an administrative body (especially one like the Interstate

Commerce Commission, exercising quasi-judicial functions) is called upon to construe a statute, the construction of which is not free from doubt, whether such construction relates to the extent of its powers or only to their application, it is not subject to control by mandamus with reference to the action involved in such construction.

> "Where the duty in a particular situation is so plainly prescribed as to be free from doubt and equivalent to a positive command it is regarded as being so far ministerial that its performance may be compelled by mandamus, unless there be provision or implication to the contrary. But where the duty is not thus plainly prescribed but depends upon a statute or statutes, the construction or application of which is not free from doubt, it is regarded as involving the character of judgment or discretion which cannot be controlled by mandamus." (*Wilbur* v. *United States,* 281 U. S. 206, l. c. 218.)
>
> "In making those decisions the Commission would necessarily act in a *quasi* judicial capacity. If it misconstrued the term 'deficit,' it committed an error; but it did not transcend its jurisdiction." (*Butte, etc., Ry. Co.* v. *United States,* 54 Sup. Ct. Rep. 108, 110; 290 U. S. 127, l. c. 136.)

It is otherwise where the construction of the statute has been settled by repeated decisions of this court (*Interstate Commerce Commission* v. *Humboldt Steamship Company,* 224 U. S. 474; *United States ex rel. Louisville Cement Company* v. *Interstate Commerce Commission,* 246 U. S. 638), or where the bone of contention is not the construction of the statute, but the practicability of complying with it. (*United States ex rel. Kansas City Southern Railway Company* v. *Interstate Commerce Commission,* 252 U. S. 178.)

This court's decision in *Interstate Commerce Commission* v. *New York, New Haven & Hartford R. R. Co.*, 287 U. S. 178, illustrates the distinction. In the Kansas City Southern case the statutory mandate was so clear as not to admit of controversy. In the New Haven case the "duty is not plainly prescribed, but is to be gathered from statutes of uncertain meaning" (l. c. 204), and accordingly mandamus was refused. Compare, also, *Ex parte Harding*, 219 U. S. 363, and *General Investment Company* v. *New York Central R. R. Co.*, 271 U. S. 228.

Here the Commission heard all the evidence offered by petitioners, gave it careful consideration (R. 90), accorded them a full hearing, including briefs and argument, construed the statutes relied upon (which obviously contain no unequivocal mandate) and decided that the Commission could not, under the statutes, grant the relief prayed. At page 15 of petitioners' brief it is stated that, although the Commission held hearings and made a large record, "that record was made to determine the issues raised by the petition of the Missouri-Kansas-Texas Railroad and not to determine the issues raised by petitioners." Counsel doubtless made this statement from memory, not having before them when they wrote the brief the record made before the Commission. As a matter of fact, the Commission did not exclude any testimony whatever on jurisdictional grounds, but heard whatever was offered at the hearing by any intervener. For example, the following appears at page 42 of the record before the Commission:

"Exam. Barclay: Mr. Sawyer and gentlemen on the other side, Mr. Towner desires to put in some testimony in support of the Great Western's intervention, and before you start to cross examine, if it is agreeable, we will have him do that and then cross examine Mr. Felton.

Mr. Towner: Mr. Felton has to leave today and it will be a great convenience to me if you will let me put in these statements here, if that is agreeable to the examiner and the other side."

Mr. Towner then proceeded to examine Mr. Felton, who had first been put on the stand by the M-K-T.

Again, for example, at page 394 of the record, it appears that Mr. L. J. Hensley, Comptroller for the Kansas City Southern, was called as a witness and was examined by Mr. A. F. Smith, Assistant General Solicitor for the Kansas City Southern. As appears from the Commission's own report, there were witnesses on the stand representing various interveners. (R. 90.) In some respects the interveners were making common cause with the M-K-T, and in some cases it might be difficult to tell exactly on whose behalf the witness was testifying.

We have shown that the Commission's construction of the statutes was correct. The Court of Appeals evidently so thought. (R. 208, 209, 71 F. (2d) 336, 340.) Certainly no decision of this Court has determined otherwise, and clearly the construction of the statutes (on the assumption that there is any ground at all for petitioners' claimed construction) is not free from doubt. Plainly, therefore, the Commission's action cannot be controlled by mandamus.

But, petitioners say, there is a difference between the construction of statutes affecting the Commission's power to act and the construction of statutes encountered in the current application of its powers.

This distinction is illusory.

Petitioners confuse jurisdiction and power. The Commission here did not deny that it had jurisdiction to correct discriminations by virtue of Paragraphs (1) and (3) of Section 3, and to requisition the use of the terminals of one carrier for another by virtue of Paragraph (4) of Section 3. On the contrary it correctly decided that it must determine what kind of discriminations the Commission was directed or permitted to correct by the terms of Paragraphs (1) and (3) and for what carriers Paragraph (4) provided relief. It then proceeded to determine both questions.

Where a statute is construed by an administrative body, such as the Commission, a determination of its own power is almost necessarily wrapped up in the construction of the statute. When the Commission construed the word "deficit" in the Transportation Act of 1920, it necessarily determined the extent of its own power in dealing with the particular carrier. (*Butte, etc., Ry. Co.* v. *United States,* 290 U. S. 127.) When Secretary Wilbur decided that the Indian annuities provided by Congress depended on tribal relationships, he necessarily determined the extent of his own power in dealing with the particular Indians. (*Wilbur* v. *United States,* 281 U. S. 206.)

So far as Paragraph (4) is concerned, the Commission's decision was based, not on a lack of power over appropriation proceedings, but on the petitioners not being within the class for which the statutes provide relief. When the district court, in *General Investment Company* v. *New York Central R. R.*, 271 U. S. 228, dismissed the plaintiff's suit on the ground that plaintiff was not one of the class of persons for whom the Sherman Act and the Clayton Act provide relief, its decision was a decision on the merits (as this Court expressly held). As such, it is on all fours with the Commission's decision here that petitioners are not of the class of railroad companies for which Paragraph (4) of Section 3 provides relief.

> "Under this legislation, whether a claimant seeking 'relief has the requisite standing is a question going to the merits, and its determination is an exercise of jurisdiction.'" (*Butte A. & P. Railway Company* v. *United States*, 290 U. S. 127, 142.)

Furthermore, the Commission did not stop with construing its own powers. It expressly held that, on the assumption that the Commission did have full power, the petitioners were not entitled to relief on the facts. (R. 114.) The Commission said:

> "Assuming, without now deciding, that the provisions of Paragraph (1) are broad enough to embrace, as between the parties thereto, a joint terminal agreement into which all the lines have voluntarily entered and for which they are mutually responsible, the distribution of the charges here in question is not shown to fall within their condemnation. Those charges are distinctly capital charges, based upon the terminal property itself, not upon

its use, in no sense assumed by or chargeable to the proprietary lines as compensation for uses they either do or may make, and are divided among the lines in the proportions of their equitable titles to or interests in the property. For their respective uses of the property the lines severally assume maintenance and operating expenses in corresponding proportions. This is not shown to be undue prejudice or preference or unjust discrimination. Each proprietary pays an equal share of the aggregate interest and taxes upon its equal share in the aggregate property. Also, as essentially capital charges, they have no relation, direct or indirect, to the interchange of traffic between the several lines within the contemplation of Paragraph (3)."

Counsel for petitioners argue that this language shows that the Commission did not decide the issue instead of showing, as the language itself indicates, that the Commission did decide the issue. The Commission did just what the courts frequently do, considered the question of its powers and of the merits together, held that it did not have power, but that, if it did have power, plaintiff could not recover anyway. The Commission itself has done the same thing before, perhaps often. For example, in *Oklahoma-Arkansas Telephone Company* v. *Southwestern Bell Telephone Company*, 183 I. C. C. 771, to which we have already referred, the Commission says at page 774:

> "But conceding our jurisdiction for the moment, we cannot find for complainant upon the merits."

In the instant case, it is difficult to see how the decision upon the merits can be any the less decisive—merely because the Commission did not think it had the

power to grant the relief even if it had not found against the petitioners on the merits.

The powers attributed to the Commission by the petitioners fall into three categories—(1) a power to remove discriminations under Paragraphs (1) and (3) of Section 3 of the Act, (2) a power of eminent domain under Paragraph (4) of Section 3, (3) vague and indefinite powers to remove "burdens" under unnamed sections of the Act.

When analyzed, the Commission's action amounts to this:

(1) As to Paragraphs (1) and (3) of Section 3, it held that interest and tax payments of the proprietary companies were not the kind of charges contemplated by either paragraph of Section 3 and that neither Paragraph (1) nor Paragraph (3) of Section 3 had any application to them; that the contract and the proprietary relationships out of which it grew were a complete defense to any charge of unjust discrimination and that on the facts, no undue prejudice or preference or unjust discrimination was shown. (R. 97.)

(2) As to Paragraph (4) of Section 3, it held that the petitioners were not of the class of parties for whom that paragraph provided relief (R. 95), and, as to the vague undefined powers referred to, it held that no section of the Act could be found whose language the Commission could interpret to confer such powers. (R. 96.)

In other words, the Commission considered the questions and the evidence presented under Paragraphs (1) and (3) of Section 3, decided that no unjust discrimination was shown, and further decided that the contract and the

other relationships with the carriers were not of the kind to which Section 3 applied and precluded any finding of unjust discrimination by the carrier *as a carrier.* It decided that, although the Commission had jurisdiction of the parties, and generally of proceedings under Paragraph (4), the petitioners, in view of their contracts and relations with the Terminal Company and its property and other facts in the record, did not have the requisite standing to maintain a proceeding under Paragraph (4) because the Act did not authorize the Commission to proceed at the instance of carriers in the situation of petitioners.

(3) It decided, as to Section 15 (a) and the other unnamed sections of the Act, that they did not confer upon the Commission any powers to readjust the payments to be made by the users of joint facilities. The Commission could find no express mandate, or even implied permission, in these provisions, and no one else can.

The Commission, so far as the issues under the various provisions of Section 3 were concerned, thus in the exercise of its general jurisdiction to hear and decide under both Paragraphs (1) and (3) and Paragraph (4); (a) decided that it lacked power under Paragraphs (1), (3) and (4) to set aside respondents' contract; (b) decided that petitioners were not of the class for which relief was provided by Paragraph (4); (c) decided that, even if the Commission had full power to set aside the contract, no discrimination of the kind contemplated by Paragraphs (1) and (3) was shown by the evidence; and (d) for these reasons, *i. e., on the merits,* dismissed the intervening

petitions of these petitioners. The Commission's answer, in substance, so alleged. (R. 161.)

Plainly mandamus does not lie to compel the Commission to decide otherwise.

IV.

Conclusion.

The consequences of the Commission's assuming power to grant the relief prayed by the petitioners would be widespread. It is a matter of common knowledge that the railroads of the country are parties, not only to numerous joint facility agreements, but to leases and trackage agreements by the thousands, many of them for long terms, and involving property interests running into hundreds of millions of dollars. Doubtless, every railroad company would like to improve upon the terms and conditions of some of these agreements. To open the door wide enough for petitioners to squeeze through would let in a swarm of controversies.

Many of these agreements date back for years and have been amended and supplemented from time to time. The result is an intertwining of property rights, estoppels, obligations and mutual concessions constituting such a complicated structure that it would be difficult, if not impossible, for a human tribunal to so disentangle them as to arrive at the present true equities of the situation. More serious still is the disruption of contract and property arrangements and settlements of long standing and the complete destruction of all confidence in the written word. A contract would become nothing more than a

written memorandum of the intentions, hopes and desires of the parties at the moment. In the great case of *Interstate Commerce Commission* v. *Los Angeles*, 280 U. S. 52, this Court has recognized that the practical consequences should be taken into account in arriving at the intent of Congress in the use of general language in the Interstate Commerce Act. The Court said (l. c. 68, 69):

> "The Commission was created by Congress. If it was to be clothed with the power to require railroads to abandon their existing stations and terminal tracks in a city and to combine for the purpose of establishing in lieu thereof a new union station, at a new site, that power we should expect to find in congressional legislation. Such authority, if conferred in Los Angeles, would have application to all interstate railroad junctions, including the numerous large cities of the country, with their residential, commercial, shopping, and municipal centers now fixed and established with relation to existing terminals. It would become a statute of the widest effect and would enter into the welfare of every part of the country. Various interests would be vitally affected by the substitution of a union station for the present terminals. A selection of its site from the standpoint of a city might greatly affect property values and likewise local transportation systems. The exercise of such power would compel the carriers to abandon existing terminals, to acquire new land and rights of way and enter upon new construction, to abandon large tracts and to sell territory of the same extent as no longer necessary for the use of the carriers.
>
> There would have to be tribunals to apportion the expenditures and cost as between the carriers. A proper statute would seem to require detailed directions, and we should expect the intention to be manifested in plain terms and not to have been left to be implied from varied regulatory provisions of uncertain scope."

This case of *Interstate Commerce Commission* v. *Los Angeles, supra,* and the case of *Interstate Commerce Commission* v. *Oregon-Washington Railroad Company,* 288 U. S. 14, are conclusive of this case.

Another practical consideration of moment is the fact pointed out in our statement of the case that the long drawn out controversies relating to the M-K-T litigation are nearing an end by reason of the M-K-T's decision to become a party to the Operating Agreement and Stock Trust Agreement and the election of receivers, trustees and successors of other companies to adopt them. Only this litigation of the petitioners disturbs the present harmonious relationships.

We respectfully submit that the Commission was right in dismissing the intervening petitions, that, in any event, the Supreme Court of the District of Columbia rightly denied the extraordinary remedy of mandamus, that the Circuit Court of Appeals of the District of Columbia rightly affirmed the judgment of the lower court and that the judgment below should now be affirmed.

Respectfully submitted,

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